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# United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 24763

CARGILL, INC.,

*Libelant-Appellee,*

—against—

TUG FRANK A. LOWERY and FRANK A. LOWERY,

*Claimant-Respondents,*

TUG ELLEN S. BOUCHARD, MOTOR TUG ELLEN S. BOUCHARD, INC., and BOUCHARD TRANSPORTATION CO., INC.,

*Claimant-Respondents-Appellants,*

—and—

INLAND SURVEY BUREAU, INC.,

*Respondent-Impleaded-Appellee.*

## APPELLANTS' APPENDIX

JAMES F. DALTON
11 North Pearl Street
Albany, New York

and

KRISEL, BECK & TAYLOR
27 William Street
New York, N. Y.

*Proctors for Claimant-Respondents-Appellants*

UNITED STATES COURT OF APPEALS
FILED
OCT 4 1957
SECOND CIRCUIT

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## Docket Entries

Civil 5017

| DATE | | |
|---|---|---|
| 1953 | | |
| Oct. | 23 | Filed Libel |
| Oct. | 23 | Filed Stipulation for Libellant's Costs |
| Oct. | 28 | Issued Warrant of Arrest—returnable Dec. 7, 1953 at Albany, N.Y. |
| Nov. | 6 | Filed Notice of Appearance and Claim of Owner —by Krisel, Beck & Taylor, 27 William St. New York 5, N.Y. and James F. Dalton, 11 N. Pearl St. Albany, N.Y. Proctors for Claimant Respondent Motor Tug Ellen S. Bouchard, Inc. and Bouchard Transportation Co. Inc. |
| Nov. | 6 | Filed Stipulation for Value and Costs— |
| Nov. | 9 | Filed Writ of Attachment, with return of U. S. Marshal |
| Dec. | 16 | Filed Answer of Motor Tug Ellen S. Bouchard, Inc. Respondent, and Claimant of tug Ellen S. Bouchard and Bouchard Transportation Co. Inc. |
| 1954 | | |
| Feb. | 6 | Filed Answer of Respondent-Claimant Frank A. Lowery |
| Feb. | 6 | Filed Stipulation for Claimant's or Respondent's Costs |
| Feb. | 6 | Filed Claim of Owner Frank A. Lowery |
| Apr. | 10 | Filed Stipulation for Value |
| Apr. | 20 | Filed Libellant's Note of Issue—June Term—Albany, N.Y. |
| Apr. | 22 | Filed Libellant's Notice of Trial |

*Docket Entries*

| DATE | |
|---|---|
| 1954 | |
| May 28 | Filed Affidavit and Notice of Motion for consolidation of actions, ret. June 7, 1954 at Albany (#5006 and 5185) |
| June 2 | Filed Notice of Motion returnable June 7, 1954—Albany N.Y.; and affidavit (See Civ. 5256, 5006) (See 5185) for order consolidating actions |
| June 15 | Filed Notice of Motion and Affidavit, returnable June 21, 1954—Albany NY—for order to implead Inland Survey Bureau, Inc. as a respondent etc. |
| June 15 | Filed Memorandum-Decision—James T. Foley, D. J. granting certain motions (See 5006-5185-5251-5256) |
| June 21 | Motion to implead Inland Survey Bureau, Inc. as a Respondent Motion granted |
| June 24 | Motion Petition to Implead—Inland Survey Bureau, Inc., Respondent-Impleaded |
| June 24 | Motion and entered Order authorizing leave to file petition to implead Inland Survey Bureau, Inc. as respondent-Impleaded |
| June 24 | Motion Stipulation for Libelant's Costs |
| July 9 | Issued Warrant of Monition—to Implead—returnable Sept. 13, 1954 at Syracuse, N.Y.—S. D. N. Y. |
| July 16 | Filed Warrant of Monition—To Implead—with return of U. S. Marshal served Jul 13, 1954 on Inland Survey Bureau Inc. Miss J. I. McGuire, as Secretary |

*Docket Entries*

| DATE | | |
|---|---|---|
| 1954 | | |
| Aug. | 13 | Filed Notice of Appearance of Atkins, Weymar & Randell; and Joseph J. Mailloux—as proctors for respondent-impleaded Inland Survey Bureau, Inc. |
| Aug. | 13 | Filed Stipulation for Claimant's or Respondent's Costs |
| Sept. | 13 | Trials moved by Plaintiffs' Attys the cases being consolidated for the purpose of trial (See 5006-5185-5251-5256) |
| Sept. | 14 | Trial continued |
| Sept. | 15 | Trial continued Sept. 16 and 17 Trials continued Decision reserved |
| Sept. | 29 | Filed Affidavit and Order to Show Cause returnable Oct. 4, 1954—Albany, N.Y. |
| Oct. | 4 | Filed Affidavit in opposition to motion (See 5006-5185-5251-5256) |
| 1955 | | |
| Feb. | 1 | Filed Findings of Fact and Conclusions of Law |
| Feb. | 1 | Filed Opinion, Hon. James T. Foley, D. J., granting Libellant Cargill, Inc.—decree in full against the Bouchard interests the libel against Lowery is dismissed and in this Libel the impleading petition of Bouchard against Inland Survey Bureau, Inc. is dismissed (See 5006-5185-5251-5256) The cross libels of Bouchard against the Lowery interests and Cargill, Inc. are dismissed. |
| Feb. | 3 | Filed 3 Vols Transcript of Testimony (See 5006-5185-5251-5256) |

*Docket Entries*

| DATE | |
|---|---|
| 1955 | |
| Feb. 23 | Filed and entered Interlocutory Decree, dismissing libel as to Tug Frank A. Lowery in rem, and Frank A. Lowery in personam; and dismissing impleading petition against Inland Survey Bureau Inc. with costs, against Motor Tug Ellen S. Bouchard, Inc. and Bouchard Transportation Co. Inc. and appointing A. Franklin Mahoney, Attorney at Law, Cannon Bldg. Troy, N.Y. as Commissioner—etc. |
| Mar. 1 | Filed Notice of Appeal from interlocutory decree entered Feb. 23, 1955 |
| Apr. 2 | Forwarded record on appeal consisting of original papers to Clerk U. S. C. A. |
| Apr. 27 | Filed Oath of Commissioner A. Franklin Mahoney, Special Commissioner appointed in above matter |
| 1956 | |
| Feb. 28 | Filed Bill of Costs taxed at $136.80 in favor of Appellee Cargill, Opinion & certified copy of Judgment U. S. C. A.—that decree of District Court is affirmed on opinion of Judge Foley, with costs taxed in favor of the appellees; & Bill of Costs taxed at $129.87 in favor of appellee Inland |
| Mar. 19 | Filed order that judgment of Court of Appeals for Second Circuit as recited in its mandate be made the judgment of this Court & that interlocutory decree be affirmed, dismissing libel as to Tug Frank A. Lowery in rem; & Frank A. Lowery, in personam, etc. & referring matter to A. Franklin Mahoney, Commissioner, etc. |

*Docket Entries*

| DATE | | |
|---|---|---|
| 1957 | | |
| Mar. | 4 | Filed 3 Transcripts of Testimony before Commissioner |
| Mar. | 4 | Filed Report of Commissioner A. Franklin Mahoney |
| Mar. | 4 | Filed 1 package of exhibits |
| Mar. | 4 | Filed Notice of Filing of Commissioner's Report |
| Mar. | 4 | Mailed copies of Notice of Filing of Commissioner's Report to Atkins & Weymar, Attys, 70 Pine St. New York 5, N.Y.; & Krisel, Beck & Taylor, Attorneys for Respondents, 27 William St., New York 5, N.Y. |
| Mar. | 8 | Filed Exceptions to Report of Commissioner, & Notice of Motion returnable March 18, 1957 at Albany, N.Y. |
| Mar. | 8 | Filed Libellants' exceptions to Commissioner's Report & Notice of Motion returnable March 18, 1957 at Albany, N.Y. |
| June | 5 | Filed Minutes of Proceedings Apr. 28, 1955—at Albany James T. Foley, J. |
| June | 5 | Filed Minutes of Proceedings Mar. 18, 1957—Albany, N.Y. James T. Foley, J. |
| June | 5 | Filed Memorandum—Decision—Hon. James T. Foley, D.J.,—; The Report of the Commissioner is modified as indicated herein, & as so modified is confirmed. A final decree in accordance herewith shall be submitted if agreed upon, otherwise settled on three days' notice, etc. Judge Foley |

*Docket Entries*

| DATE | |
|---|---|
| 1957 | |
| June 17 | Filed Bill of Costs taxed at $35.50 this 17th day of June, 1957 |
| June 17 | Filed Bill of Costs taxed at $3461.70 this 17th day of June, 1957 |
| June 17 | Filed copy of Bill of Costs U.S.C.A.—Second Circuit & Judgment affirming decree of District Court on opinion of Judge Foley with costs taxed in favor of the appellees |
| June 17 | Filed Bills & Receipts for Transcripts (3) Bills |
| June 17 | Filed Order that certain Exceptions of Libellant are sustained & granted & that all exceptions of Motor Tug Ellen S. Bouchard, Inc. & Bouchard Transportation Co., Inc. Claimant Respondents are denied |
| June 17 | Filed & entered Final Decree that Libellant Cargill, Inc. recover from Tug Ellen S. Bouchard & her claimant & stipulates for value & costs & Bouchard Transportation Co. Inc. & it stipulates for costs, its damages in sum of $75,527.67 with interest thereon from the date of loss Sept. 25, 1953 to the date of this decree amounting to sum of 16,889.22 & costs as taxed in libellant's favor in this Court in sum of 3,461.70 & as taxed in Court of Appeals in the sum of $136.80 making the total sum of $96,015.39 & that libellant have execution therefore & it is further Ordered that respondent-impleaded, Inland Survey Bureau, Inc. recover of & from Motor Tug Ellen S. Bouchard, Inc. & Bouchard Transportation Co., Inc. & their respective |

*Docket Entries*

| DATE 1957 | |
|---|---|
| | stipulators for costs, its costs as taxed in this Court in sum of $35.50 & as taxed in Court of Appeals in sum of $129.87 making total of $165.37 & that said respondent-impleaded have execution therefore & it is further Ordered that unless this decree be satisfied, an appeal be taken within 10 days of the service of a copy of this decree with notice of entry thereof on proctors for the claimant-respondents etc. cause the engagements of their stipulations to be fulfilled, etc. |
| June 17 | Entered Judgments as above noted in Decree |
| June 19 | Mailed Notice of entry of Judgments to Atkins, Weymar & Randell; Joseph J. Mailloux; Krisel, Beck & Taylor, Esqs.; Messrs. Foley & Martin; Mr. James F. Dalton, Albany, N.Y. |
| June 27 | Filed Notice of Appeal of claimant respondents, tug Ellen S. Bouchard, Motor Tug Ellen S. Bouchard, Inc. & Bouchard Transportation Co., Inc.—from final decree entered June 17, 1957 etc. |

## Excerpts From Testimony

## Volume II

—75—

* * * * *

ALEXANDER H. SCHNAPP, called as a witness in behalf of Frank A. Lowery, being first duly sworn, testified as follows:

*Direct Examination by Mr. Heckman:*

* * * * *

—78—

* * * * *

Q. When you examined this vessel was the stern in a square shape? A. Well, when I examined this one, the half of the stern was pushed over, as I said, and of course when you go down she would be square on the bottom.

—79—

Q. And when you say pushed over, over in what direction? A. Towards the bow.

Q. Pushed forward? A. Pushed forward, that's right.

Q. And you have said that part of the stern of the cabin was up as far as Hold No. 4? A. In the middle of hold No. 4, yes.

Q. From what you saw of the condition of the stern, did you form any opinion as to what caused the upper part of the stern to be pushed forward and part of the cabin to be in No. 4 hold?

Mr. Taylor: I object to this, your Honor. I don't know—

The Court: Just a minute. Read the question.

(The Court Reporter repeated the question as above recorded.)

*Alexander H. Schnapp—for Frank A. Lowery*

Mr. Taylor: It is an opinion as to something that is not susceptible to opinion evidence.

Mr. Heckman: Maybe I can make it easier. I withdraw it.

Q. Did you form an opinion as to whether the vessel had been struck?

Mr. Taylor: I object to that.

A. Yes, sir.

The Court: Overruled.

—80—

Q. And from your examination did you form an opinion as where she was struck? A. Yes, we discussed it.

The Court: What did you say?

The Witness: We discussed it among ourselves.

The Court: I don't care what you discussed. What about your own mind? Did you from your examination in that diving, could you say whether or not it was struck?

The Witness: Yes, sir.

Mr. Taylor: That I object to, your Honor.

The Court: Overruled.

A. Well, obviously it must have been hit very hard because even some of these old barges, they take an awful beating. I mean, I just worked on one yesterday that was in trouble—

* * * * *

*Eugene Meyer—for Bouchard*

—316—

• • • • •

EUGENE MEYER, called as a witness in behalf of Bouchard, being first duly sworn, was examined and testified as follows:

• • • • •

*Direct Examination by Mr. Taylor*:

• • • • •

—319—

• • • • •

*Cross Examination by Mr. Heckman*:

• • • • •

—322—

• • • • •

*Cross Examination By Mr. Mason*:

• • • • •

—323—

• • • • •

*Cross Examination by Mr. Atkins*:

Q. Mr. Meyer, taking the Marion O'Neill, was her cargo intact? A. Well, I believe some of it had spilled out.

I can't see under water. I could not say.

Q. And the Mae Lowery, was her cargo intact? A. Pretty much so on the Mae Lowery.

Q. And would you say that none had washed away? A. No, I would say that some had washed away.

Mr. Atkins: That is all.

*Redirect Examination by Mr. Taylor*:

• • • • •

*Eugene Meyer—for Bouchard*

—324—

* * * * *

*Recross Examination by Mr. Atkins:*

* * * * *

*Recross Examination by Mr. Heckman:*

* * * * *

—325—

* * * * *

*Recross Examination by Mr. Atkins:*

Q. Let me ask you this, Mr. Meyer, suppose for the sake of my question that the cargo not only was intact but by super something it was not found damaged. Would that be a factor in the work that you were to perfom? A. No, sir. We had to remove the scow from the channel the best way we could.

Q. You were not out there to perform a salvage operation as such?

—326—

Mr. Taylor: I object to this.

The Court: Overruled.

Were you out there to save the cargo or get that wreck out of the channel?

The Witness: Your Honor, we were there to get that wreck out of the channel.

The Court: That was your main purpose?

The Witness: That was my job.

* * * * *

*Melville J. Horn—for Cargill*

**Volume IV**

—23—

MELVILLE J. HORN, called as a witness in behalf of libellant, Cargill, being first duly sworn, was examined and testified as follows:

*Direct Examination by Mr. Atkins*:

• • • • •

—24—

• • • • •

Q. Now it has heretofore been testified and is in the record upon the examination of one Mr. William Onderdonk that Appleton and Cox, Inc. as attorneys in fact for the interested underwriters or underwriters settled the loss under a customary loan receipt with Cargill, Inc.; • • •

—25—

• • • • •

Q. Now what steps did you take, what did you perform in connection with such service? A. I telephoned to Mr. Hochberg of Millhurst Mills, Freehold, New Jersey and to Mr. Ormsby of the Soybean Products Co. in Oswego and asked both of those gentlemen to proceed immediately to

—26—

Albany and meet one of our men, a Mr. Hylind and make us an offer for the grain.

Q. Who is Mr. Hylind? A. Mr. Hylind is an employee of the Inland Survey Bureau.

Q. And on what date did you do the telephoning that you have referred to? A. Shortly after 9 a. m. September 25th.

Q. Now thereafter did you keep in touch with the situation here in Albany? A. Yes.

Q. By what means? A. Telephone.

Q. And what did you do and what did you ascertain?

*Melville J. Horn—for Cargill*

A. I requested Ormsby and Hochberg to come to Albany, look over the situation, meet Mr. Hylind and Cargill, Inc. and make an offer for this grain under the water, • • •

—31—

• • • • •

Q. And you did receive reports from Mr. Hylind? A. Yes, and—

Q. (Interrupting) That is enough right there. Now acting on reports that you received from Mr. Hylind what did you do in chronological order? A. On September 26th, the day following, Mr. Hylind telephoned me that Hochberg was on his way, that he had heard from Ormsby's

—32—

representative here on that afternoon, Saturday afternoon. Hochberg confirmed to me over the telephone that he would pay two thousand dollars for the cargo as is and plus one-half of any profits if he made any profits. Later in that day Mr. Ormsby said he would pay two thousand dollars flat, no profits. I told Mr. Hylind to tell this to Mr. Bouchard's surveyors and attorneys which he says he did. Now I am sorry, this is hearsay, Mr. Hylind came back to New York the following day and I have his notes here.

Q. You talked with Mr. Hylind in New York? A. I talked to him and made these notes right there and then and he says—

Mr. Taylor: (Interrupting) Is there any reason why we can't get Mr. Hylind?

The Witness: Yes, beg your pardon, go ahead, yes, we can produce Mr. Hylind.

• • • • •

*Melville J. Horn—for Cargill*

—34—

• • • • •

*By Mr. Atkins*:

Q. Go ahead. A. We gave Mr. Brennan in Albany and Mr. Westerfeld names of the two people who had made

—35—

offers on the cargo and I think about noon that day we telegraphed to Mr. Brennan, Army Engineer in Albany, that we did not believe it commercially expedient to pursue the matter any further and the two bids as far as any records show did make some offer to the Army Engineers.

• • • • •

—49—

• • • • •

Q. Now I hand you a telegram dated September 28th, 1953 and ask you to read the telegram and ask you whether you received that telegram? A. At about ten o'clock in the morning of Monday, September 28 we received a telegram from Millhurst Mills.

• • • • •

—50—

Q. Will you tell us in general the contents of the telegram.

—51—

Mr. Taylor: I object to the content; I have no objection to his saying what he did after receiving it.

A. (The Witness) What I did was based on what he did, what I did was based on this telegram, one of them.

The Commissioner: Do you know now, Mr. Horn, generally the substance of the telegram?

A. (The Witness) Yes, I knew that morning.

The Commissioner: I will overrule the last objection.

A. (The Witness) He said in substance he was withdrawing the bid of two thousand dollars plus splitting the profits, that was on Monday morning.

*By Mr. Atkins*:

Q. Following the receipt of the telegram what did you do? A. We gave up and telegraphed Mr. Brennan that we were abandoning it.

• • • • •

*Cross Examination by Mr. Taylor*:

• • • • •

—55—

• • • • •

Q. What did you do in the way of hiring equipment to salvage the cargo? A. We discussed the matter with Mr. Connie Ekmark and we come up with a figure around twelve or thirteen thousand dollars which absolutely I know from experience was more than that cargo could be sold for.

• • • • •

—61—

• • • • •

Q. What is your recollection of the price of processed wheat—strike that out. Do you know what wheat that had been wet and then dried was selling for in September 1953? A. You might possibly get as much as a feed price for it but I would have no recollection of that.

*Melville J. Horn—for Cargill*

Q. What was the feed price in September 1953? A. I don't recall.

Q. How can you tell us whether it was worthwhile salvaging these barges? A. After you do it for twenty-five years—

Q. (Interrupting) Please just answer my question, if you don't know what the feed price was in September 1953— A. (Interrupting) Because we estimated that it would cost us not less than $12,000.00.

Q. What I asked you—

> Mr. Atkins: (Interrupting) Wait a minute.
>
> The Witness: (Interrupting) We estimated it wouldn't cost us less than $12,000.00 to get the grain
>
> 
>
> out of these barges and that would be wet grain and very wet, it would have lost much of its gluten, which is the real value in wheat. We figured that if we did get it out of the boats wet, we might get ten cents a bushel in its wet condition, but $12,000.00 would be 120,000 bushel.

Q. What was the feed price? A. I don't know but I can find out for you, and to produce—

Q. (Interrupting) You don't know. A. Just a moment please, to mak it into a feed grain—

> The Commissioner: Just a minute, Mr. Horn, will you please confine your answers to answering the question.

A. I can't answer a question from a man who don't know anything about the salvaging of wheat.

*Melville J. Horn—for Cargill*

*By Mr. Taylor:*

Q. I don't know a thing about it, I would like to; you answer the question—what was the feed price, what was the price of feed in September 1953? A. Maybe I can help you out, I hope I can.

Mr. Atkins: Well maybe I can help out here, Mr. Brennan the Engineer testified that he received ten cents a bushel.

The Witness: That was wet, that wasn't feed, you had to spend a lot of money to make that into feed.

Mr. Taylor: Where is that testimony, Mr. Atkins?

—63—

Mr. Atkins: It is in the record.

The Witness: Can I answer now, Mr. Taylor?

Mr. Atkins: He asked me a question—on page 58 of Mr. Brennan's testimony.

Mr. Taylor: Thank you.

Mr. Atkins: The question was: "Do you know how much you receive for the cargo?" And his answer was: "I do not recall the exact amount but we sold it after taking competitive bids for about ten cents a bushel, placed by us in purchaser's scow."

Mr. Taylor: Would you repeat the last question.

(The Reporter read back the last question.)

A. (The Witness) I have no record with me.

Q. You don't know what farmers were paying for cattle feed in September 1953? A. I don't recall.

Q. Now of course the price farmers were paying would be entirely different than the Millhurst Company would pay for it? A. No, Millhurst could sell the feed.

**Q. They sell it to the farmers? A. Yes, to produce the feed you must dry it.**

**Q. We could presume they sell it at a profit? A. I hope so, else they couldn't afford to bid us two thousand dollars.**

• • • • •

—80—

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**Q. What did you estimate could be removed from these two barges? A. I didn't think we would get more than half of it.**

**Q. You didn't think you would get more than half? A. No.**

**Q. You never at any time were in Albany and saw these barges? A. No.**

—81—

**Q. You relied entirely on what you heard? A. Yes, from these people right here in Albany.**

**Q. When did you advise the Army Engineers that you were abandoning this cargo in behalf of Cargill?**

Mr. Atkins: That is in the record, on September 28th Mr. Brennan testified.

*By Mr. Taylor:*

**Q. When did you decide to abandon the cargo? A. That day, that morning.**

**Q. Monday morning? A. Yes, after Mr. Hochberg withdrew on us we didn't see much hope.**

**Q. Did anything happen with Mr. Ormsby's offer? A. No, Ormsby gave us an offer more because he wanted to help us out from previous business, he is in the business and he wanted to keep his hand in.**

• • • • •

*Melville J. Horn—for Cargill*

*Redirect Examination by Mr. Atkins:*

• • • • •

—82—

• • • • •

*Recross Examination by Mr. Taylor:*

• • • • •

—84—

• • • • •

*Redirect Examination by Mr. Atkins:*

• • • • •

—87—

• • • • •

*Recross Examination by Mr. Taylor:*

• • • • •

—89—

• • • • •

Q. Just one other question, you weren't figuring on selling this stuff as dried wheat, your only— A. (Interrupting) We didn't know if we could see a market, we would have salvaged, we couldn't see a market so we didn't go any further.

Q. Were you figuring on selling only wet wheat? A. Sometimes we would sell if wet if we couldn't dry it.

Q. In this particular instance you figured on wet wheat? A. Yes.

Q. That is the only estimate you were going on? A. Yes, on a wet wheat basis.

Q. You weren't figuring on drying this wheat and selling it as cattle feed? A. No, let the other fellow gamble.

• • • • •

—96—

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Mr. Taylor: I would like to read a very short bit of testimony from the record of the trial, page 323. This is from the testimony of Eugene Myer who was subpoenaed at the trial and he was the derrick boat operator for the Corps of Engineers that raised some of this wheat, and he testified—

Mr. Atkins: What page?

Mr. Taylor: Page 323—on cross examination by Mr. Atkins as follows:

"Question: Mr. Myer, taking the Marion O'Neill

—97—

was her cargo intact?

"Answer: Well, I believe some of it had spilled out, I can't see under water, I could not say.

"Question: And the Mae Lowery, was her cargo intact?

"Answer: Pretty much so on the Mae Lowery.

"Question: And would you say that none had washed away?

"Answer: No, I would say that some had washed away."

• • • • •

—98—

MARCUS MARSHALL, called as a witness on behalf of the respondents, being first duly sworn, was examined and testified as follows:

*Direct Examination by Mr. Taylor*:

Q. Are you connected with Cargill, Inc.? A. Yes, sir.

Q. And in what capacity, Mr. Marshall? A. As operating superintendent of the plant at Albany.

Q. What does this plant generally do? A. Receives and ships grain.

Q. And do you have facilities for drying grain at the plant? A. Yes, we have a dryer.

• • • • •

—102—

• • • • •

Q. Do you happen to know how much water grain, wheat, of the type we are dealing with here absorbs? A. No, I do not.

Q. Well, is it true that it absorbs 30 per cent moisture and that is all? A. I couldn't say.

Q. You could not say. Did you do anything about salvaging this grain that was sunk in the Marion O'Neill and Mae Lowery? A. Not to my memory, no.

Q. Did anybody so far as you know connected with your plant do anything with respect to salvaging this grain? A. No, not to my knowledge.

Q. How far is your plant from the place that these barges sank? I take it you are familiar with where they sank. A. I am not too familiar with where they sank, but it was somewheres around the bridge, I think.

—103—

Q. One sank about 2200 feet from the bridge; about how far is that from your plant? A. Which way?

Q. South of the bridge. A. I would say it is in the neighborhood of a mile and a mile and a half or two miles, something like that.

• • • • •

*Theodore De Mars—for Respondent*

—108—

• • • • •

THEODORE DE MARS, called as a witness on behalf of the respondent, being first duly sworn, was examined and testified as follows:

*Direct Examination by Mr. Taylor*:

Q. Captain De Mars, what is your business? A. Ship surveyor and appraiser.

Q. And what has been your experience in this business? A. Well, I hold a Master's and Pilot's license of unlimited

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tonnage of steam vessels.

Mr. Atkins: I will concede his qualifications as an expert surveyor, with one exception, as to the grain business.

*By Mr. Taylor*:

Q. Supposing you tell us your qualifications. A. Well, I served as Master and Pilot of steam vessels under the Department of Commerce, licensed for over 12 years, and I have been a ship's surveyor and appraiser since 1920. I have been engaged in that business over 36 years. During that time I have surveyed damages, appraised vessels, written specifications, supervised repairs on new and old construction. I have appraised all types of vessels. I have salvaged vessels. I have supervised the salvaging of vessels and I have even been a Marine diver.

Q. And have you had occasion to figure the cost of salvaging vessels? A. Yes.

Mr. Atkins: Now, may I ask him a question?

*Theodore De Mars—for Respondent*

Mr. Taylor: All right.

Mr. Atkins: Have you ever tasted grain?

The Witness: No, I have smelled it, it is not a very nice smell.

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*By Mr. Taylor*:

Q. Now, will you assume—first of all, have you familiarized yourself with this copy of Bouchard Exhibit 10 showing the location of the sunken vessels Marion O'Neill and Mae Lowery and showing the depth of water in which they were sunk? A. I am familiar with the location, but I am not too certain of the depth.

(Paper handed to witness by counsel.)

A. Well, the depth is 14 feet and 17 feet, soft bottom.

Q. And are you familiar with the Lowery barges, the Warren Clute, the Inez Lowery, the Gabe Heffernan and the Betty L.? A. Yes.

Q. Did you know the Mae Lowery and Marion O'Neill before they were sunk? A. Yes.

Q. Are you familiar with the Frank A. Lowery? A. I am.

Q. Now, will you assume that in the first week of—will you assume that the Marion O'Neill on September 25, 1953 had 18,500 bushels aboard her and that the Mae Lowery had 19,000 bushels, that they were the fifth and sixth barges—or sixth and fifth barges, respectively, together with the four other Lowery barges that I have mentioned in the tow of

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the Frank A. Lowery, and they were sunk in the Hudson River as indicated—where indicated on Libellant's Exhibit 10 in this proceeding, when they were struck by the tow of

the Ellen S. Bouchard and they sank about two twenty a.m. Friday morning September 25, 1953 and that thereafter the tug Clayton P. Kehoe ran upon the Mae Lowery; can you express an opinion with reasonable certainty as to the cost of picking up the grain that was in those two sunken barges and loading it aboard other barges and bringing them to New York?

Mr. Atkins: Now, I am objecting to this on the ground he has not qualified himself as an expert in this respect.

Mr. Taylor: In salvaging cargo?

Mr. Atkins: Salvaging cargo, wheat.

Commissioner Mahoney: I feel that he has. That objection is overruled and the question is addressed to you, do you have an opinion?

The Witness: The answer is Yes to the question.

*By Mr. Taylor*:

Q. Well, will you give us your opinion as to the cost of salvaging or putting that grain aboard barges and bringing it to New York. A. Salvaging and delivering it at New York, $7,837.

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Mr. Atkins: How many cents?

The Witness: No cents.

*By Mr. Taylor*:

Q. And how much grain did you estimate would be picked up in this operation? A. About 35,000 bushels.

Q. And how much time would it take to carry out this operation? A. Well, maximum ten days to complete the operation.

*Theodore De Mars—for Respondent*

Q. Now, if this cargo was brought to the Cargill plant at Albany, how much would it cost for this operation? A. $5,731.

Commissioner Mahoney: Would you give me that figure?

The Witness: $5,731.

*By Mr. Taylor*:

Q. How long would it take? A. Eight days.

Q. And will you explain how you arrived at your figure and your time? A. Well, the equipment to do this job would have to be brought up from New York. It would require a steam crane or a crane, it don't have to be steam, but I would use steam as the most practical unit, and two barges. Then they would have to be towed from New York without cargo

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to Albany. They would then moor adjacent to the wreck, dig out the grain and put it into the light barges and it would be necessary to put additional pumps on the barges that were receiving the sunken cargo to keep the water out, and all that is included in my estimate. A tug would be standing by during this operation because there would be anchors to run and there would be barges to shift because when one barge is unloaded it would be necessary to shift the crane from that barge to the other and to the wreck in on the beach.

Q. Now, when you say ten days, when do you start that, is that from Friday September 25? A. No, that would start Saturday morning. Friday, it would take the best part of the day to round up your equipment and get your arrangements, your towing arrangements, your crane and your light barges and I would start it on Saturday.

*Theodore De Mars—for Respondent*

Q. And how soon— A. (Interrupting) And they would arrive here Sunday night.

Q. How soon could you get the cargo to the Cargill grain elevator? A. Then I would expect it to take three days to discharge the two barges into the lighter barges.

Q. That would be Monday, Tuesday and Wednesday?

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A. That is correct.

Q. For picking up the cargo? A. Right.

Q. And by Wednesday night you could have it at Cargill elevator, is that correct? A. While they are digging out the second barge, the first barge would be at Cargill, if they would agree to receive the cargo.

Mr. Taylor: That's all.

Commissioner Mahoney: Do you know what the saturation point of grain is when immersed in water?

The Witness: Approximately 30 per cent.

Commissioner Mahoney: And how long a length of time would grain have to be immersed in water to reach that saturation?

The Witness: I would say 15 to 20 hours.

Commissioner Mahoney: And after 15 or 20 hours, regardless of the length of time it was left there, it would not absorb more than 30 per cent; is that right?

The Witness: That is correct.

Commissioner Mahoney: That's all.

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*Cross Examination by Mr. Atkins*:

Q. Captain De Mars, for the sake of my cross examination I am going to put you on this salvaging job and I am going to assume that a collision that occurred Friday night,

Friday morning about two a.m., that you were notified—you live in New York? A. Yes.

Q. Now, what is the first thing you would do? A. Answer the telephone.

Q. What would you do after you answered the telephone? A. I would make notes.

Q. And what would you do after making notes? A. Would comply with the recommendations and proceed to accomplish—

Q. (Interrupting) What recommendations? A. We have two boats at Albany, so many tons, we want you to make the necessary arrangements to get them unloaded, get the cargo to New York so it can be sold and reconditioned.

Q. Then who would you go to? A. The first thing I would do, I would engage a crane.

Q. From whom would you engage the crane? A. I wouldn't limit myself to any one, I would call Weeks, Howard and Company or M. J. Rudolph and Company,



they all own whirler cranes.

Q. What arrangements would you make with them? A. If they had a crane available and what rate they would charge.

Q. And what rate would you charge? A. $250. a day.

Q. And who would guarantee the payment of such charges? A. I would, under the orders that I have already received.

Q. Now, would you before doing that come to Albany? A. No.

Q. What would be the basis of your information as to the condition of the barges in the river and the location? A. I wouldn't care about the barges, the barges are sunk and these barges are fitted with wood hatches which are

over the cargo space and then there is canvas tarpaulins over the hatches. Those tarpaulins are secured down to the deck and I know that the cargo would be intact.

Q. How would you know that? A. Because it can't get out as long as the tarpaulins are in place, and it would remain there until it became saturated, then it would lay there.

Q. You would expect it to be saturated? A. I would expect it to be saturated by the time I got up here, yes.

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Q. Now, would you take into consideration anything with reference to the barges apart from the cargo? A. No, I am not concerned about the barge, I am now going to remove cargo from both damaged barges and I would assume nothing about the barges Mae Lowery and Marion O'Neill, that if they were hit sufficient to sink them that they wouldn't have sufficient value to warrant repairing.

Q. What would you do with the barges? A. I would moor them, I would get them to the beach at high tide.

Q. And what beach would you get them to? A. Anywhere at all.

Q. Where? A. In the Hudson River in the vicinity of Albany.

Q. What beach would you take them to? A. It isn't difficult to beach barges within five miles above or below, there is plenty of land where you can get barges into shore and secure them to a tree, if necessary, with cable so it will not become a menace to navigation.

Q. And in your computation did you take into consideration the cost of the removal of the barges, in your computation in answer to Mr. Taylor's question? A. I would say I did.

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Q. Well, I mean, did you? A. I would say I did.

Q. How much did you take? A. I am keeping the tug by all the time to take care of the barge when it becomes discharged, take care of the barge—in other words, during the three days we have nothing for that tug to do but to assist the crane, move the crane when the one barge is loaded, when the one barge is loaded to move it to a mooring that it will be floating next to when it is cleaned out, and it can be towed to shore. These are wood boats and they will float and you will get a line out to a tree.

Q. By that time would you have removed all of the grain from both the barges? A. No, up to this point—

Q. (Interrupting) You mean some grain in some of the barges? A. Up to this point I would only have one barge, would be working on one barge at a time. We haven't touched the second barge yet. I would remove practically all the grain in the barge.

Q. How long would it take you to get one barge unloaded? A. I would say a day and a half work maximum allowance for removing the grain out of each barge.

Q. And you would do one barge at a time? A. Yes, you



can't disturb two boats that are firmly secured—

Q. (Interrupting) Would you—

Mr. Taylor: Let him finish.

The Witness: I can't touch the second one until you have the first one secured.

*By Mr. Atkins:*

Q. And would you take into consideration that the barge you were not working on was a menace to navigation? A. No, I wouldn't take that into consideration, that isn't my responsibility. I would expect that after these boats were

sunk that a prudent owner would make all the necessary arrangements to mark that sunken vessel, that is his duty as an owner.

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*By Mr. Atkins*:

Q. Now, I want you to give me item for item your computation of costs in this salvage? A. Delivered at New York?

Mr. Taylor: At Albany?

Mr. Atkins: Both.

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The Witness: This is my computation in salvaging the cargo and delivering it at New York. Crane hire, 8 days, at $250. per day, $2,000. Services of diver, three days, $125. per day, $375.

*By Mr. Atkins*:

Q. How much a day? A. $125.

Commissioner Mahoney: What was the figure for the crane?

The Witness: $2,000., $250. a day. Barge hire, ten days—

Mr. Atkins: What was the total on the diver?

The Witness: $375. Two barges to take the cargoes, that would be ten days each at $40. per day, $800. The services of a pump, the barge that is receiving the wet cargo would contain a lot of water, as it drained out, it needed extra pumps, we have pump hire for ten days at $30. per day, $300. Now, to go —trucking pump to and from, $40.

*Theodore De Mars—for Respondent*

Commissioner Mahoney: A day?
The Witness: No, $20. each way.

*By Mr. Atkins:*

Q. From where to where? A. Wherever the barge is,

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and then off. This estimate is New York. Towing New York to Albany 27 hours one location for a flotilla, that is, tug standing by and attending crane in the salvage operations 72 hours. That should total 134 hours at $33. per hour.

Q. How much? A. $4422.

Q. What other items? A. That completes the items on New York delivery, and the totals are $7,837.

Q. And now the item of parking the wrecks. A. No, the tug that is standing by, that is, 72 hours, will move the wrecks to the location.

Q. You didn't take that into consideration? A. It is in the tug time?

Q. You're under oath, did you take that into consideration when you made that up? A. Yes, I know I cannot unload a wooden hull and let it drift around in the river, that is why I had a tug standing by and when the crane will be anchored, that will be fixed, but there must be a tug standing by to take this unruly boat, we will call it, the boat that becomes light and is apt to become a menace to navigation, so the tug takes him in charge and he will stay and secure him at some location. He may go to a pier in the neighborhood, put out a line or cable, and he may come back to another location;

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in other words, anything to expedite because he wouldn't want to spend too much time beaching that wreck because he has got to go out and get the crane and shift that up to the other wreck, then when the crane starts on the other

job, then he can come back and dispose of his wreck; the only operation is tug and cable.

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BERT EISENBERG, called as a witness on behalf of the Respondents, being first duly sworn, was examined and testified as follows:

*Direct Examination by Mr. Taylor*:

Q. What is your business, Mr. Eisenberg? A. Manufacturing and selling animal feeds, ingredients.

Q. And what experience have you had in this business? A. Well, the length of time?

Q. Yes. A. About 8 years.

Q. And do you deal in all sorts of damaged food products including grain? A. That is our business, to buy damaged and salvaged material that can't be used for human consumption.

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*By Mr. Taylor*:

Q. Now, Mr. Eisenberg, will you assume that in the first week of October 1953 you had available in New York a quantity of about 35,000 bushels of wheat on barges which had been recovered—of wheat that had been recovered from two barges that had been sunk in Albany, New York on the early morning of September 25, and which was removed from the sunken barges on September 28th, 29th and 30th and was available in New York on the early morning of Friday October 2nd, I believe that is, 1953, and that the original wheat which was a quantity of 37,500 bushels

of which 18,500 was No. 3 red winter wheat and 19,000 was No. 1 red winter wheat, and that about 35,000 bushels had been recovered; can you give an opinion with reasonable

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certainty as to the value of this cargo in New York after it had been dried?

Mr. Atkins: After it had been dried?

Mr. Taylor: Yes.

The Witness: October 1953?

*By Mr. Taylor:*

Q. Yes, 35,000 bushels. A. Let's see, now.

Q. Do you want to convert that into tons? A. I can give it per ton—well, 300 bushels—

Q. (Interrupting) Give it to us either as a price per bushel or ton. A. I will give it per ton, because we buy the damaged material, we have to turn it into tons, we don't sell it by bushels.

Mr. Atkins: It takes more than 300 bushels to make a ton.

*By Mr. Taylor:*

Q. Can you give us your opinion as to the value of this cargo after it has been dried? A. As to the value that I would offer for salvor, as to the retail value?

Q. As to the retail value of this cargo. A. I would say in October 1953 somewhere between fifty-five and sixty dollars per ton.

Q. How much would it cost to recondition that cargo,

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these 35,000 bushels, can you give us that on a ton basis? A. You mean taking it out of the tug and reconditioning it.

Q. Taking it out of the barges and drying it and having it ready for sale. A. There is one place in Brooklyn you can have it done for about twenty-five cents a bushel, and I think—I am sure that the Central charges twenty-three cents per bushel, and if we were to do it in our plant it would be cheaper because I wouldn't be paying the profit I would to these people to dry, we would be able to do it in the neighborhood of eighteen cents per bushel.

Q. To recondition it? A. To make it usable for animal feeds only I am talking about now.

Q. Can you convert that into how much per ton?

(Discussion off the record.)

Q. Will you tell us how much you figure that it would cost to recondition this cargo per ton? You have already said it would cost eighteen cents per bushel to dry, and how much is that per ton? A. Eighteen cents a bushel?

Q. Yes. A. About four to five dollars a ton.

Q. Now, when you say four to five dollars a ton, are you

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you figuring the cost it would be in your own plant? A. Yes.

Q. Do you know what the—withdraw that. Now, how much moisture would you have to take out of this wheat to make it saleable?

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A. That depends on the original amount of moisture that would be in the wheat, which runs about an average from eleven and a half to thirteen per cent in good wheat before it is damaged, and assuming that it will absorb up to 3(

per cent moisture after it is immersed in moisture, we have to take out the difference, which would be 16 to 17 per cent.

Mr. Taylor: I want to state for the record at this time that the stipulation marked Libellant's Exhibit 1, indicates that the moisture contained in the 18,500 bushels was 13 per cent; and that the 19,000 bushels contained—of No. 1 red winter wheat, contained 12.6 per cent of moisture.

*By Mr. Taylor:*

Q. You say that the reconditioned wheat could be sold at about sixty dollars a ton? A. In the neighborhood of that, I think I said from fifty-five to sixty dollars, depending on the market at the time and demand and so forth, but that would be the price, because brewers grain at that time I

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know definitely was selling at $57. a ton, that is comparable, but not as good as this, brewers wet grain dried.

Q. Will you explain to us a little bit what brewers grain is? A. You get the wet grain from a brewery and, of course, they take it to a drying plant and take out the moisture. It contains almost 60 to 70 per cent moisture. In other words, you get one ton for four tons when it is dry. That has a market value, it varies, $55. f.o.b. Brooklyn, depending whether it's plentiful or whether there's a shortage in the market, $57.

Q. How does this reconditioned No. 3 red winter wheat and No. 1 red winter wheat compare with brewers dried grain? A. As to price it is comparable, this wheat would be a little better. It is comparable if it is dried—if it is dried properly it would be better.

Mr. Taylor: That's all I have.

*Jack Hanisch—for Respondent*

*Cross Examination by Mr. Atkins:*

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Commissioner Mahoney: Just a moment, Mr. Eisenberg, this figure of fifty-five to sixty dollars per ton, that is the resale figure of the grain?

The Witness: Yes.

Commissioner Mahoney: That you would resell it at?

The Witness: Yes.

Commissioner Mahoney: That is not the figure you would buy it at?

The Witness: No, sir.

Commissioner Mahoney: And in that figure there would be what it would cost your firm to recondition the grain?

The Witness: Yes, sir.

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JACK HANISCH, called as a witness on behalf of the Respondent, being first duly sworn, was examined and testified as follows:

*Direct Examination by Mr. Taylor:*

Q. Mr. Hanisch, what business have you been engaged in? A. In the hay, grain and feed business.

Q. And how long have you been in that business? A. This business was established in 1923, and I have been actively engaged since 1934.

*Jack Hanisch—for Respondent*

Q. Have you been a buyer of grain in good condition and bad condition? A. Yes, sir.

Q. Both as a user and a seller? A. Both as a user and seller.

Q. What has been—what occasion have you had to buy grain as a user?

Mr. Atkins: Don't you think you ought to ask



where he lives? I would like to know that.

*By Mr. Taylor:*

Q. Would you give your address? A. 20 Wavecrest Drive, Islip, Long Island.

Q. Would the reporter read back the last question?

(The Reporter read back the previous question as above recorded.)

A. Well, I have a dairy farm in addition to the hay, grain and feed business, and I produce wholesale milk.

Q. And how many head of cattle do you have? A. Well, we keep a regular herd of 60, and lately are down to 40.

Q. Now, would you assume that during the first week of October you had available in New York a cargo of 35,000 bushels of wheat on barges, in New York, which had been removed from two barges that had been sunk in Albany, New York on the early morning of September 25, and that this sunken wheat consisted originally of 37,500 bushels, 18,500 of which was No. 3 red winter wheat and 19,000 bushels was No. 1 red winter wheat, and that this cargo was available to you in New York

on or about October 2, 1953; can you give an opinion with reasonable certainty as to the value of this cargo in New York in October 1953? A. I—

Mr. Atkins: I am going to object to it unless you

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put in where in New York.

*By Mr. Taylor:*

Q. Will you also assume that this cargo had been dried and reconditioned? A. In other words, picked up at the plant, the price picked up at the plant?

Q. Yes, can you give us an opinion as to its value? A. Yes, I can.

Q. What is that opinion? A. To me, the wheat dried and processed as you said, would be worth anywhere from fifty-five to figty-eight dollars per ton.

Q. Have you dealt in other types of reconditioned grains? A. Yes, at one time or another.

Q. Have you dealt in brewers dry grains and brewers wet grains? A. Absolutely, that is the bulk of my business.

Q. How do those feed grains compare in value to this cargo that we are talking about after it has been dried? A. I would say that it was of the same value or better for feeding purposes, for animal feed purposes.

Mr. Taylor: That's all.

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Eugene C. Meyer, called as a witness in behalf of the Claimant-Respondents, Bouchard, being first duly sworn, was examined and testified as follows:

*Eugene C. Meyer—for Bouchard*

*Direct Examination by Mr. Taylor:*

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*Cross Examination by Mr. Atkins:*

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Q. Would you mind describing the visual appearance of the wheat as it came out of the respective barges—I mean when you put the wheat into the dump scows? A. Well, of course, all the wheat was swelled and most of it came out fairly clean on the O'NEILL, which was the upstream scow. There was quite a lot of broken wood and so forth

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especially on the stern end. Most of the wheat was in fairly clean condition when we brought it up.

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*Redirect Examination by Mr. Taylor:*

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Q. Did you put—the wheat that was disposed of, was that put on the buyer's barge or on one of your barges? Do you happen to recall? A. What do you mean by disposed of?

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Q. The wheat that was bought by— A. You mean after it was sold.

*Eugene C. Meyer—for Bouchard*

Q. The wheat that was sold, on whose barges was that put? A. I believe that was one of Cargill's barges, I believe. I suppose the company hired it or rented it.

Q. In any event it was not a Government barge? A. No.

Q. What did you do, take that wheat off your dump barges and put it on those other barges? A. No.

Q. How did you do that? A. Our own dump barges, the wheat that was loaded in our barges was taken down the river and taken to the dump area.

Q. And the wheat that was sold? A. Was put right into the barges that was alongside.

Q. That did not belong to the Army Engineers? A. That's right.

Mr. Taylor: That is all I have.

*Recross Examination by Mr. Atkins*:

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Mr. Taylor: Mr. Meyer, did you once say that this cargo came out of these barges "in a golden stream"?

The Witness: I would say, as I said before, the upper scow, which was considerably damaged in the rear, when I dredged, I brought up a lot of pieces of wood and the cabin, and one thing and another, but the general condition of the wheat was fairly clean, and especially in the second scow, it was not damaged so heavily. The wheat came up nice and clean.

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*Franklin H. Haber—for Respondent*

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FRANKLIN H. HABER, called as a witness in behalf of the Respondent, being first duly sworn, was examined and testified as follows:

The Commissioner: Give your full name to the Court Reporter, please.

The Witness: Franklin H. Haber.

*Direct Examination by Mr. Taylor*:

Q. Mr. Haber, what is your connection with the Army Engineers? A. Chief of Operations.

Q. Are you the Assistant in Charge here in Albany? A. That's right.

Q. Mr. Brennan, as I understand, is not here today? A. He is home sick.

Q. Now, from your records, are these the records that you have before you kept in the regular course of the operations of your office? A. This is our office file of

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records.

Mr. Atkins: I won't object on any ground that they are not any evidence of official documents. I will concede that.

The Commissioner: I will consider the foundation for these records has been laid.

*By Mr. Taylor*:

Q. From your records can you tell us how much wheat was taken out of these two barges? A. I have a little note here that I made when you called me on the telephone.

*Franklin H. Haber—for Respondent*

It is in the file on the questions you asked me, how much grain was removed and the answer is 29,555 bushels.

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*Cross Examination by Mr. Atkins:*

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Q. Do your records, Mr. Haber, show that the barges MARION O'NEILL and MAE LOWERY were abandoned by the owner to the Government? A. Yes, sir.

Q. Do they show the date of the abandonment? A. Yes, sir.

Q. And can you give us the date? A. Here is a copy of a telegram reading "I, as owner of the barges MARION O'NEILL and MAE LOWERY sunk at the Dunn Memorial Bridge in the Hudson River, hereby notify you of the abandonment thereof."

Q. And the date? A. It is dated 28 of September 1953.

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Q. Do your records show whether your office advised Inland Survey Bureau, Inc. of Mr. Hyland—Hylan, I guess it is, that any contemplated salvage operations with respect to cargo must be commenced by a certain date? A. I have to look through the file here. I have a copy of a telegram here I believe which answers your question. Dated September 28, 1953 from Inland Survey Bureau, Inc., 111 John Street, New York 38. And it is addressed to Ambrose F. Brennan, Engineer in Charge, United States Army Engineers, Room 322, Federal Building, Albany, New York: "Re barges MARION O'NEILL and

*Franklin H. Haber—for Respondent*

MAE LOWERY sunk Albany, based on our investigation we have concluded that it is not commercially expedient to enter upon any salvage operation with respect to the cargoes in each of the barges and, therefore, on authority of cargo underwriters we are taking no further steps to enter upon any damage salvage operation with respect to those cargoes. Many thanks for your fine cooperation and fine consideration. Inland Survey Bureau, Inc."

Q. Now, do your files show the date, if any, that the Army Engineers determined to clear the channel of the wrecks, that is to remove the wrecks? A. I have nothing on determination, but I have a note here that operations

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on the barge MARION O'NEILL commenced 29 September 1953; completed on 3rd of October 1953 and barge moved out of channel to east shore of river 4th of October, 1953.

Q. What barge is that? A. MARION O'NEILL.

Q. Have you anything on the MAE LOWERY? A. Operations on MAE LOWERY commenced 5 of October; complete 8 of October; barge moved out of channel to east shore of river October 9, 1953.

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The Commissioner: Just the amount of the three separate bids.

The Witness: Yes. One has "our check $380 reduction 10 per cent deposit," ten cents was the bid. This one is ten and total quantity 19,000 wheat bushels. This one is from Universal Grain Company regarding 2145 based on 19,000 bushels loaded on

scows furnished by us—2150 and four-tenths cubic bushels. You are to advise us if we are the successful bidder and we will send you a certified check.

The Commissioner: What was the amount of their bid?

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The Witness: $2,945, based on 19,000 bushels.

*By Mr. Atkins:*

Q. Twenty-nine cents? A. $2,945.

Q. $2,945. And to whom did you sell? A. Universal Grain.

Q. You accepted the bid of Universal Grain? A. Universal Grain Company.

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Q. Now, the purpose of removing the barges was to clear the channel? A. That's right.

Q. For navigation; is that not correct? A. That is correct.

Q. Now, the Government undertakes to do that at its own cost; is that not correct, when the craft involved are abandoned to the Government? A. Depends on the circumstance. In this particular case it was an emergency and it had to be done immediately, and we started operations the next day. In the case of some abandoned vessels and they are located in such a position that they are not obstructing navigation, immediate navigation, they are sometimes let out at bids.

Q. But in a case like this, where you consider them a menace to navigation, you undertake the work and did in this case? A. That is correct.

*Franklin H. Haber—for Respondent*

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*Redirect Examination by Mr. Taylor:*

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Q. Now, who were these bids from again: Start with the first one. A. Cargo Recovery Corporation.

Q. Who is that signed by? A. Allen B. Clegg.

Q. May I see that? A. (Hands document to counsel.)

Q. And who signs as president of Cargo? A. Stewart D. Ormsby, President, and it is signed Allen B. Clegg.

Q. Do you know whether that is the same Mr. Ormsby—strike that out. Where is this from? A. Cargo Recovery Corporation, East Seneca St., Oswego, New York.

Q. And Mr. Ormsby signs himself as President of that

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corporation? A. He is so listed.

Q. Now, you have one from Millhurst Mills? A. Yes, sir.

Q. Who signs as principal of that company, if it appears? A. No signature.

Q. I think the record is already clear that Millharst Mills was one of the two people that Mr. Horn asked for a bid for this wheat. Do you have any information as to Millhurst Mills—strike that—who Universal Grain is? A. I have a telegram from Universal Grain Company, also the third bid.

Q. Were you here, Mr. Haber, when the—strike that out. Did you at any time over that weekend, when this casualty occurred, that is after September 25, have any

conversations with a representative of the Universal Grain who was here in Albany at that time; do you recollect? A. I don't remember.

Q. Now, is it fair to say that all these people from whom you got the bids, all of them were here in Albany before the time that these bids went out? A. I wouldn't know.

Q. Well, they would obviously have to be.

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Mr. Atkins: Well, I object to it.

A. They did business with Mr. Brennan, not with me.

Q. With Mr. Brennan. As far as you know, nobody else got notice of this sale? A. As far as I know.

Q. And as far as you know, these people were also familiar with the situation before they made these bids? A. They were, obviously.

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*Recross Examination by Mr. Atkins*:

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*Re-Redirect Examination by Mr. Taylor*:

Q. Mr. Haber, just one thing. Are you familiar with the accounting practices of the Army Engineers? A. To a certain extent.

Q. Isn't it their practice to charge a certain amount of the office overhead on every operation? A. To every operation?

Q. Yes. A. Not to every operation.

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Q. Well, wouldn't a certain amount of office overhead be charged to this operation? A. Probably would be.

*Franklin H. Haber—for Respondent*

Q. And would that be this office, the New York office? A. There is a field office overhead and district office overhead which would be put on the charge.

Q. And part of that would be charged to this operation? A. Probably would be, yes, sir.

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Q. These barges didn't necessarily have to be broken up; did they? A. The method of disposal is entirely up to the contractor, subject to our approval.

Q. And where did he have to take them, in accordance with your request? A. He didn't have to take them anywhere, but got permission to use Sturtes Island.

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Q. Do you know how far away that is from here, Mr. Haber? A. I would say it is about the same distance, three or four miles.

Q. Do you know how many other contractors put in bids? A. Yes, sir.

Q. How many? A. They are in the records here. There were three bidders.

Q. And when were the barges removed? A. You mean the completion date?

Q. The date they were removed by the contractor, if you have it there. A. Date of completion of work, 8 of January, 1954.

Q. And when did the work start? A. Date of commencement of work 30 November, 1953.

*Franklin H. Haber—for Respondent*

Q. And where were the barges between October 9 and November 30th? A. East shore of the River.

Q. They were just there at the shore from the time they were discharged of the wheat until the time that they were removed by this contractor on November 30?

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A. From the time he removed them to the east shore until the time the contractor started work, they were still tied up there.

Mr. Taylor: That is all.

*Re-Recross Examination by Mr. Atkins*:

Q. Will you just state for the record the name and the amounts of the other bidders? A. Yes, sir. The following bids were received and opened on two p.m. eastern standard time 23 October, 1953. Bidder Merritt Chapman and Scott Corp., amount $9,774; R. J. Campbell $8,200.

Q. Is he from Canada? A. R. J. Campbell. I assume he is from New York.

Q. How much was that? A. $8,200. Island Marine Contracting Corp. $7,771.

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**Findings of Fact and Conclusions of Law in Civil No. 5017**

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

Civil No. 5017

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CARGILL, INC.,

—against—

Tug FRANK A. LOWERY and FRANK A. LOWERY, Tug ELLEN S. BOUCHARD, MOTOR TUG ELLEN S. BOUCHARD, INC. and BOUCHARD TRANSPORTATION CO. INC.,

*Claimants-Respondents.*

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HON. JAMES T. FOLEY, *D.J.*

FINDINGS OF FACT

1. Libellant was and is a Delaware corporation, with its principal office and place of business in Minneapolis, Minnesota, and also an office and grain elevators at the Port of Albany, New York.

2. On or about September 14, 1953, its subsidiary, acting in its behalf, Cargo Carriers, Inc., entered into agreement with Frank A. Lowery for the purpose of the carriage of grain on the Lowery tug and certain barges for transport from Buffalo to Albany. The carriage was subject, among others, to the terms and provisions of the New York Produce Exchange Charter Party, No. 1, as Amended. (Car-

gill Exhibit 2). The Libellant was the owner of the grain loaded on the tug Frank A. Lowery and the six barges which were involved in the collision with tug Ellen S. Bouchard and its push-tow, Barge B-90, on the morning of September 25, 1953.

3. I now adopt and confirm as though made herein, Findings of Fact 1, 2, 3, 4, 5 and 6 made in the libel Frank A. Lowery against Tug Ellen S. Bouchard, et al., Civil No. 5006 and filed as of this same date.

4. Under the carriage and charter contract, Lowery was not responsible for damage arising from collision unless caused by its negligence. Libellant, Cargill, Inc. performed all the conditions of the contract on its part to be performed.

5. Inland Survey Bureau, Inc. made its inspection as the agent of certain marine underwriters and not as agent for Cargill, Inc. Inland made careful survey for its client and did not act fraudulently towards its principals. The vessels it inspected were fit and seaworthy for their planned voyage and their condition did not cause or contribute to the happening of the collision or the sinkings and damage.

CONCLUSIONS OF LAW

1. The alleged loss and damage to the cargo of grain was caused solely by the fault of respondent, the Bouchard interests, and without any fault or carelessness on the part of the Lowery interests.

2. Under the contract of carriage, the Lowery interests "shall not be liable for losses caused * * * by collision, ex-

cept where caused by their negligence or fault." Lowery is not responsible for the collision and therefore the alleged loss of Cargill, Inc. resulting from such collision.

3. Inland Survey Bureau, Inc. was not an agent of Cargill, Inc. There was no privity except between marine underwriters and Inland. The inspection reports, made as an ordinary, business practice, were not fraudulent or negligently made. The condition of the vessels did not cause or contribute to the collision, sinking and damage.

4. The Libellant is entitled to a decree in full in its favor against the Bouchard interests. The impleading petition against Inland Survey Bureau, Inc. is dismissed as insufficient in law and fact.

JAMES T. FOLEY
*United States District Judge*

Dated: Albany, N. Y.
January 31, 1955

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## Opinion of the District Court

HON. JAMES T. FOLEY, *D.J.*

This array of admiralty suits arises from a collision in the Hudson River at a point adjacent to the south end of the City of Albany. Four of the suits involve the original collision and the sinking of two barges and damage to others; the fifth suit is based upon the aftermath of such collision resulting in the running upon one of the sunken barges by the tug, Clayton P. Kehoe. The cases were tried together by the court. Although it is not an easy task, I shall endeavor to discuss them together.

Complexity entered the trial, and now the disposition of the issues, because of the unusual position and theory of defenses, impleader and cross libels advanced by the Bouchard interests at the trial and in their briefs. Also, the ordinary divergence and contradiction in the testimony which seem to be the pattern in collision cases, whether on the highways or waters, is present to an extreme degree. Some of the unseemly conflict in eye-witness versions as to distances is treated in accord with the philosophical comment in The Detroiter, 2 Cir. 82 F. 2d 234: "The thing happened at night, when estimates of distance, proverbially unreliable at any time, are especially illusory." Despite such difficulties, it is clear that the dominant issue for decision throughout is the responsibility for the first collision. Such issue marks the main course and the extent of the voyage into novel and uncertain channels shall depend greatly upon the disposition of this problem. This determination, as always, must be based upon the facts developed on the trial by testimony, depositions and exhibits, as I find they preponderate to one side or the other, and the

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definite law applicable, if such exists, to the particular factual situations involved.

To give some sense to the discussion and to limit the confusion engendered at least in my mind by the presence of an impleaded respondent, the Inland Survey Bureau, Inc., in the Cargill libel, and the voluminous cross libels by the Bouchard interests back against the libellants, Frank A. Lowery and Cargill, Inc., it may be well to summarize generally certain facts and events together with the circumstances surrounding the collision. Such recital should clarify to some extent the basis for the involved procedures and contentions that enter the picture.

The Lowery flotilla, ordinarily made up as at the time of the collision, sailed the waters of the Hudson River and Barge Canal for a considerable number of years. It was old in the service of carrying cargo, well known to the trade and canal and river people, and on many occasions it carried scrap iron west from New York City to Buffalo, and grain east from the terminal at Buffalo to the City of Albany. The "steamer", Motor/Vessel Frank A. Lowery, was a converted wooden barge itself, carried cargo and pulled its tow of wooden barges tandem-style behind by hawsers keeping the tow close up, each bow to stern. It was an established custom and practice over the years for the protection of the charterers and the insurance underwriters of cargo, to inspect all the vessels of the Lowery flotilla at the beginning of each trip and after the discharge of cargo at the destination. Many of these detailed reports, described as on-hire and off-hire inspection reports, and particularly those made in reference to the carriage of scrap iron, are introduced by Bouchard to disclose such extraordinary weakness, in-



firmity, old age and disrepair as to warrant the inference and conclusion that such conditions caused, or contributed to the cause of the collision on September 25, 1953, in the

river at Albany, or at least contributed to the sinking of the two barges and damage to the other barges and cargo.

Specifically, Inland Survey Bureau, Inc. is on the scene as an impleaded respondent, brought in by Bouchard in the Cargill libel, because in early September it inspected the Lowery flotilla for its client, certain insurance writers, for the carriage of Cargill grain from Buffalo to its grain elevator in the Port of Albany. At first Inland disapproved the vessels as unfit for the carriage of grain, but after repairs were made by Lowery himself and crew to the inner lining of the barges, the vessels were approved, the grain was loaded and the Lowery fleet came through the canal and down the river to the place of its misfortune.

The Lowery flotilla on the early morning of September 25, 1953, cleared the Dunn Memorial Bridge at Albany with six wooden barges in tow. The fifth barge was the Mae Lowery. The sixth barge was the Marion O'Neill. The river and channel at or near this point has substantial expanse, and the Dunn Memorial Bridge under which the tow passed is a main artery for automobile and truck traffic from the Albany side of the river to the Rensselaer or east side of the river. The destination of the flotilla, the Cargill grain elevators at the Port of Albany, is but a short distance beyond the bridge on the west bank of the Hudson River. Proceeding downriver behind the Lowery fleet came the tug Ellen S. Bouchard, pushing in tow the steel barge B-90. Its destination was an oil dock on the east side of the river on the Rensselaer side, in the near vicinity of the collision. At a point 800 to 1100 feet beyond the Dunn

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Bridge, the Bouchard tow struck the stern of the barge Marion O'Neill, which sank almost immediately. The time was 2:20 A.M. Eastern Daylight Time. Within a range of

ten to fifteen minutes, despite some effort on the part of her captain to pump her, the Mae Lowery also sank. At about 4:00 A.M. the tug Clayton P. Kehoe came down the river from a dock in the City of Albany and ran upon the wreck of the Mae Lowery.

From this background came the five suits. First, Frank A. Lowery, the owner of the Lowery flotilla, sues the tug Bouchard and the Bouchard interests for the loss of the two barges, Marion O'Neill and Mae Lowery, and damage to other barges, as a result of the collision. Second Cargili, Inc. sues both the Lowery and Bouchard interests for the loss of the grain carried in the sunken barges with an indefinite claim for damage to grain carried in the surviving barges. It is in this action that Bouchard impleads Inland Survey Bureau, Inc., on the alleged ground that Inland is liable to Cargill, Inc. (which did not sue Inland) for negligent inspection of the Lowery fleet and its approval of the fleet for transport when allegedly it was not fit and able to transport safely. It is their contentions that Inland acted as the agent for Cargill in making the inspection, that Cargill should be charged with the knowledge of the agent that the Lowery was unable to control her tow, and finally, for these reasons, Cargill, Inc. may be charged with fault for the collision. In its brief, Bouchard is gracious enough to state: "It is of little moment to Bouchard, under the circumstances, whether Cargill collects from Inland or not." The third suit is termed a protective cross libel by the Bouchard interests against the Lowery interests for indemnity and contribution in the event of any recovery



by Cargill, Inc. against Bouchard. There is no claim of damage for the barge B-90 or the tug Ellen S. Bouchard. Then, to balance out things evenly, and possibly square away the entire situation, the fourth suit is another pro-

tective cross libel by Bouchard against Cargill, Inc. for indemnity and contribution in the event of recovery by Lowery against Bouchard. The fifth suit is a simple, understandable one by the owner of the tug Kehoe against the tugs Bouchard and Lowery, and Lowery personally, for the damage the tug sustained.

*The Collision Issue**

This issue is clearly the crucial one. I have little difficulty, from a review of the evidence, to place the responsibility for the collision upon the tug Ellen S. Bouchard. Despite the conflicting testimony, the credible evidence establishes to my judgment that the situation was plainly and simply an overtaking one with a complete lack of due care and caution in the navigation and maneuvering of the tug Bouchard and the push tow, Barge B-90.

The excellent photographs in evidence (Bouchard Exhibits 22a-h, Lowery Exhibits 6, 7a-b, 8a-b) show that the place of the accident was at a substantial span of river and channel with an almost straight contour within the river banks. The size and apparent strength of the B-90 is shown in photographic Lowery Exhibits 10, 11 and 12, and the tidiness and outward maintenance of tug Lowery is shown in Lowery Exhibit 18. The night was described as a fine, clear, moonlit night by Kjolner, the mate of the Bouchard, with the admission by him that no wind or current affected

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the navigation of the Bouchard tow previous to the collision. (A-13). The Lowery tow was first sighted when the Lowery tow was clearing the Dunn Bridge and the Bouchard tow clearing the second railroad bridge, a distance

* References are to the record.

of 2500 to 2600 feet (196). There was no other traffic in the river either southbound or northbound to interfere with a normal and cautious overtaking at the time of the collision or to distract attention from the Lowery flotilla ahead in the river. The Bouchard tow with its speed had complete control of the decision as to the closing and overtaking a tow which the mate knew was slow and had tendency to yaw. There was plenty of time and distance upon the approach to slow to a minimum speed, and even reverse, until he was sure of the speed, location and maneuvers of the Lowery fleet.

The "crossing under the stern" explanation does not impress me. The fancy language and interpretation of Kjolner to distinguish the situation from an overtaking is not plausible. (184, 202-4; 225). His attempts to grasp at straws cast doubt upon his testimony. As, for example, a current, eddy or ebbtide may have caused the Lowery to swing (235-6), and the fear of a yacht in the vicinity. (268). If one accepted his testimony from the deposition read at the trial: "You forget, Sir, I am going from west to east. I am leaving him. I have gone by." (204); "I am going on the east bank from the west bank * * * going across and not north and south" (206), it would be difficult to comprehend that an actual collision occurred.

After much tugging and hauling, some admission as to the real situation of an overtaking comes from the statement of Kjolner that as they were proceeding previous to collision he probably would have reached his destination of the

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Gulf Oil Dock in Rensselaer before the Lowery tow came abreast of it, (208-10), and at last the guarded statement that it was his intention to get further downstream than the Lowery was (211). I accept his statement, although

doubtful, that the two-whistle signal was sounded because I feel it gives further support to its meaning as an overtaking signal, as he testified at the Coast Guard hearing (229).

As to the abrupt sheer by the Lowery tow across the entire navigable channel, there is nothing in the record but conjecture, speculation and assumption upon which to base such a finding. The most significant and silent answer to this contention is the location of the sunken Marion O'Neill about 150 feet westward from the east channel line, (46) and about 50 feet east of mid-channel line (60). Even more compelling is the location of the sunken Mae Lowery across the west channel line, the side upon which the Lowery fleet was proceeding downstream when first sighted by the Bouchard. As Cone said, who was on the scene first, the Marion O'Neill went down fast (522-525). The blow, although forceful, was an overriding one which went over the stern of the Marion O'Neill, and it is clear the Marion O'Neill sank immediately and did not move far from the point of contact. The force of the impact is supported by the diver inspection of the Marion O'Neill (78-81), and the derrick operator who baled out the wheat from the Marion. (316-321). Much of the evidence convinces me that the Lowery tow was in good line at or near mid-channel at the time of the collision. It would tax credulity to believe that the tail of the tow swung just prior to the collision to block the entire navigable channel.

The collision, in my judgment, was a combination of error, mistake, confusion, faulty navigation and maneuver, -183- and lack of reasonable care, alertness, foresight and judgment on the part of the mate and deckhand of the Bouchard that solely, proximately and efficiently caused the collision,

the sinkings and the damage. The emergency was not created by the Lowery. The situation was an overtaking one and inasmuch as it is undisputed there was no exchange of signals, and no consent was obtained from Lowery for passage, the law is settled that the burden was on the Bouchard to slow down, keep astern and such distance as to avoid collision. (The Industry, 29 F. 2d 29; The Holly Park, 2 Cir. 39 F. 2d 572).

With this conclusion, to discuss all the contentions advanced by Bouchard to place the fault for the collision on the Lowery fleet would be quite pointless, and would make this opinion much more aimless than probably it is now. The failure of a stern lookout by Lowery, the failure to blow the danger signal by Lowery, the failure of steering wheels on all the barges, the alleged inherent weakness of the barges, and other contentions, fall by the wayside, because I do not find that they contributed to the happening of the accident. The testimony of the experts as to the possibilities and probabilities, as to what might have been or could have been, is not of sound, probative value, because it is my conclusion from direct evidence and inference therefrom that the tow did not sheer, and the sole cause of the sinking of the two barges was the force of the impact. "The collision is sufficient to account for it all." The City of Macon, 121 F. 686.

Much of the testimony of the Bouchard experts, and I acknowledge them as eminent men in their field, is conjectured, and even approaches the mystical and spiritual. It is probably good guessing but not good proof; it comes



from inference based upon inference, presumption based upon presumption. (United States v. Ross, 92 U. S. 281; Looney v. Metropolitan & R.R. Co., 200 U. S. 480-488).

Statements that the Mae Lowery might not have sunk if it were a good, sound, strong, rigid boat does not have much meaning when the facts show that the last barge directly behind it was struck with such force that the entire tow surged forward alongside the Lowery motor vessel. There is no evidence present to show something was not done to save the Mae Lowery in the short period of time before she settled. It may also be that the Lowery barges were nearing the end of their economic life, but it seems safe to say that if the collision had not occurred they surely would have made the landing at the Cargill elevators and discharged their cargo before they were forced to graceful retirement.

The half damage principle in the law applied to old and infirm boats is applied to situations where the boats do not have the fair and ordinary strength to resist slight or ordinary contact. Much of the law cited by Bouchard is good, sound law but it does not fit the facts here, and is clearly distinguishable.

*The Cargill libel and Bouchard cross-libels*

The previous discussion settles the issues in the Cargill libel and the impleading petition therein against Inland Survey Bureau, Inc. Under the charter arrangement for the carriage of grain (Cargill Exhibit 2) Lowery shall not be responsible for damage arising from collision unless caused by its negligence. I have found Bouchard solely responsible, and Lowery not at fault, and Cargill, Inc. is entitled to a decree in full, under my reasoning, solely against the interests of Bouchard.

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Despite the speculation again that the Lowery fleet was old, unseaworthy, unfit for the voyage and a menace and

nuisance to navigation, the best evidence is that it had transported over the years and was transporting at this time cargoes of grain, and on other occasions had carried scrap iron. In my judgment it was sufficiently fit and seaworthy for the assigned voyage to Albany. No inspection reports, unless divine, could prophesize the collision below the Dunn Bridge, and I have concluded that such collision was the sole, proximate cause of the sinking and damage, and was caused by the carelessness of the Bouchard.

There is no evidence that Inland Survey Bureau, Inc. acted as agent for Cargill in its inspection for the carriage of grain on this occasion. In fact, the contrary is shown. The privity existed between the underwriters and Inland. The reports, involving scrap iron carriage, were to estimate possible damage claims. When grain was carried as here, the purpose of the inspection was to ascertain the lining of the vessel for the safe transport of the commodity. It was an established, ordinary, good business practice before the risk was taken to insure a cargo. Apparent inconsistency is present, because in one breath Bouchard says the reports are good, detailed reports that show unseaworthiness, and in the next they were not a careful inspection and survey. There is not the slightest intimation of fraud on the part of the Inland Survey Bureau, Inc. in the protection of the substantial interests of its clients. By no stretch of the imagination can I apply the doctrine, even with extension, of MacPherson v. Buick Motor Co., 217 N. Y. 382, and Ultramares Corporation v. Touche, 255 N. Y. 170, to this situation.

The Bouchard cross libels seem to me to be in the nature of an offensive defense, and the issues raised thereby and

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the contentions advanced to support them have been answered.

*The Kehoe Libel*

The issues here are substantial, and under the peculiar facts present an interesting and close problem in law. The true factual situation is not too difficult to penetrate because the preponderance of the credible evidence convinces me that neither the Bouchard nor the Lowery gave any warning to the Kehoe by alarm signal or searchlight as she came down the river and fouled the sunken Mae Lowery. The impressive testimony for this conclusion is first that of McCormick, the mate of the Kehoe, steering the tug downriver. He testified he heard no alarm or saw no searchlight in the channel or adjacent waters to warn him of the wreck in the channel (346, 348). The Mae Lowery was submerged at the time, and I find no fault in the Kehoe in proceeding under the circumstances at 10 miles per hour, a lawful speed for the channel. The time was 4:00 A.M. and it was still dark when it ran upon the Mae Lowery. Secondly, I accept the statements of Cone, the deckhand, that at the time the Kehoe hit the Mae Lowery wreck the Bouchard and Lowery tugs were lying alongside a dock several hundred feet from the Mae Lowery; he was fixing his lines and talking to the men on the Lowery; the Bouchard searchlight was out of order; the Bouchard did not blow any alarm; the Lowery did not blow an alarm or use its light. (564, 565, 569, 570). The other versions of warning by alarms and lights from various locations are too contradictory to accept. The Cone description is plausible because the excitement of the events still prevailed in the night air, and to the great credit of them all as good people,



it was natural to talk over the unfortunate collision, and particularly the fate of the old barge captain, who went down with his ship, and whom they were most anxious to

find. However, it kept their attention from the traffic in the river channel.

The Kehoe libel is directed against the tugs Lowery and Bouchard in rem under the general theory of negligence for lack of due care by reason of the failure of both to stand by and warn the river traffic. The second action in the libel is against Frank A. Lowery, in personam for an alleged violation of the Wreck Statute (33 U. S. C. A. 409) for failure to mark the wreck of the Mae Lowery, as owner, in accordance with the provisions of that law.

In cogent and persuasive briefs, the Proctors for Kehoe contend the Wreck Statute should not be the sole measure for the responsibility of the collision and damage to the Kehoe. The distinction is made that because of the presence of the two tugs in close proximity to the sunken Mae Lowery there was a duty and obligation upon both of them and their crews *to stand by and warn*, which was separate and apart from the duty imposed by statute upon the owner Lowery *to mark* the wreck as prescribed. (emphasis mine). It is not too debatable that if some warning had been given by either tug the second collision might have been averted.

A strong and consistent line of authority has placed the duty to mark upon the owner of the sunken wreck alone. (The Anna M. Fahy, 2 Cir., 153 F. 866; R. J. Moran, 2 Cir., 299 F. 502; Red Star Towing & Transportation Co. v. Woodburn, 2 Cir., 18 F. 2d 77; Berwind-White Coal Mining Co. v. Pitney, 2 Cir., 187 F. 2d 665). The general principle of statutory responsibility is maintained throughout the decisions.

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In the Moran case, citing the Fahy case, it is reiterated: "This court has held that duty is upon the owner and no one else, and that there is no divided responsibility; the

reason being that, if the statute is to be effectual, there cannot be." Again, in Red Star, at page 79, citing the above two cases: "It must be remembered that the tugs do not share in the duty to mark the wreck, whatever their fault for causing it." In the more recent Berwind-White case, at page 669: "It is a matter of public policy reflected in the statute to place the responsibility for marking the wreck squarely upon the owner alone."

As Kehoe maintains, there is intimation in several of the cases that certain conditions may arise to impose the duty upon the tug at fault instead of the owner. However, the extreme in such conditions is shown by the example in The Anna M. Fahy, supra, page 868: "where all representatives of the owner are drowned or where communication with him is impossible from any cause." The question of the liability of the railroad was not decided in the Berwind-White case, and the reasoning was parallel to the possible responsibility of a wharfinger to a business invitee coming into a pier. (See Cornell Steamboat Co. v. Gladstone, 8 F. Supp. 431.)

In my judgment, there is not enough present here for me to qualify the flat principle of responsibility set by higher authority. The master of the tug Lowery was on the scene at all times. If he had performed the statutory duty to mark, which he must have known,—and I think standing by and warning would be substantial and probably better performance of the statutory obligation under the circumstances,—the accident might have been averted and his owner relieved of the responsibility commanded by law.

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Despite the situation which is extraordinary in the vessels lying side by side where each could warn, I think liability must be confined to and determined under the Wreck Statute.

However, if I am in error, I would hold the Lowery responsible under the general doctrine of negligence and not the Bouchard. Under the facts as I have found them, the master was aboard and in charge of the Lowery for some time previous to collision by the Kehoe on the wreck. He had nothing to do but try to mark or warn, and he did neither. His searchlight was working and that of the Bouchard was not. His main interest throughout was in the surviving barges of his tow. He knew much better than the Bouchard people where the Mae Lowery lay because he was alongside when it settled and ordered the lines cut from it as it sank. Captain Weber of the Bouchard was not aboard for some time before the Kehoe came down and he gave his mate and deckhand instructions to warn. The Bouchard spent more than an hour looking for the drowned captain and was at the wreck of the Marion O'Neill during that time, which was 1400 or 1500 feet above the Mae Lowery. A capable volunteer, Weber tried to contact the Coast Guard and Engineer to mark the wreck even though the responsibility was not his.

The decision of responsibility under the Wreck Statute is troublesome for me. In reference to the marking, the term "immediately" has been construed to mean within a reasonable time, (The Anna M. Fahy, supra), and in some conditions failure to mark within two hours may be unreasonable. (Petition of Anthony O. Boyle, Inc., 161 F. 2d 966). The approximate time from the sinking of the Mae Lowery and the fouling by the Kehoe would be about ninety



minutes. It is possible that Mr. Lowery had his telephone notice from Tucker at least a half hour before 4:00 A.M. The period of time, if actual notice is necessary to the owner, would be a short period and might be considered

unreasonable. However, his master had immediate, personal knowledge, stayed in the vicinity and did not mark or even attempt to mark. The practicality of the situation should be considered. The most owner Lowery could have done to meet the statute would be to tell Tucker to go down and tell the captain to mark the wreck, which Lowery says he did, when the captain was already there and assumed to know the obligation as a master in charge. Olsen, the master of the Lowery, knew the location of the wreck much better than Mr. Lowery or the Coast Guard at that critical time. Notice to the Coast Guard would not have relieved Mr. Lowery from his liability to make all reasonable efforts to mark, (Berwind-White Coal Mining Co. v. Pitney, supra, page 669), and the evidence does not show effective abandonment by 4:00 A.M.

It is not clear in the law that the knowledge of the master may be imputed to the owner under the Wreck Statute, but under the facts here it should. There is good comparison in Berwind-White, supra, page 669, where the personal knowledge of a general foreman was charged to a corporation. (See Eastern S.S. Corp. v. Great Lakes Dredge & Dock Co., 256 F. 497; Drill Boat No. 4, 233 F. 589). I hold that Frank A. Lowery, in personam, is responsible to the libellant, Kehoe, for violation to mark under the particular circumstances present, because of the knowledge and fault of his master in charge in not marking the wreck Mae Lowery within a reasonable time.

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To summarize the decisions in the five suits:

The Libellant, Frank A. Lowery, may have a decree against the tug Ellen S. Bouchard. Libellant Cargill, Inc. may have a decree in full against the Bouchard interests, the libel against Lowery is dismissed, and in this libel

the impleading petition of Bouchard against Inland Survey Bureau, Inc. is dismissed. The cross libels of Bouchard against the Lowery interests and Cargill, Inc. are dismissed. The owner of the tug Clayton P. Kehoe may have a decree under the second cause of action in its libel against Frank A. Lowery, personally. The first cause of action in this libel against the tug Bouchard and the tug Lowery is dismissed. If necessary, the decrees shall be settled on five days' notice.

I have considered all the evidence and exhibits. I shall file herewith separate findings of fact and conclusions of law in each suit. The exhibits received in evidence shall be returned to the respective attorneys by whom introduced.

Dated: Albany, N. Y.,
January 31, 1955.

## Findings of Fact and Conclusions of Law in Civil No. 5006

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

Civil No. 5006

FRANK A. LOWERY,

*Libellant,*

—against—

Tug ELLEN S. BOUCHARD, Motor Tug ELLEN S. BOUCHARD, INC. and BOUCHARD TRANSPORTATION COMPANY, INC.,

*Claimants-Respondents.*

HON. JAMES T. FOLEY, *D.J.*

FINDINGS OF FACT

1. That Frank A. Lowery, a resident of the State of New York, was the owner of the M/V Frank A. Lowery/ and the barges Marion O'Neil, Mae Lowery, Inez Lowery, Warren W. Clute, Betty L. and Gabe Heffern. Motor Tug Ellen S. Bouchard, Inc. was the owner of the Tug Ellen S. Bouchard.

2. M/V Frank A. Lowery is a converted barge of 240 gross and 195 net tons, 108′ long, 21′ wide and 15′ deep in the middle. It was built in 1918, equipped with a 240 H.P. diesel engine in 1929. The six Lowery barges named above were all wood with rounded bows and square sterns, 110′ long, 22′ wide and 12′ deep in the middle. Tug Ellen S. Bouchard was a steel hull diesel tug of 128 gross and 64

net tons, 1000 H.P., built in 1951, 81.7′ long, 25′ wide and 10.9′ deep. Its pushtow, at the time of the collision, the B-90, was a steel barge of 1276 gross and net tons, built in 1951, 230′2″ long, 43′2″ wide and 14′5″ deep.

3. On the early morning of September 25, 1953, the Lowery flotilla was proceeding down the Hudson River with the barges named in tow in tandem style behind the motor vessel by 75 foot hawsers. The fifth barge in line was the Mae Lowery, the sixth was the Marion O'Neil. This tow cleared the Dunn Memorial Bridge at Albany and was proceeding on the starboard side of the channel, with its tow at or near mid-channel. It was sighted as it cleared the Dunn bridge by the Bouchard tow, which was at the railroad bridge 2500 or 2600 feet above the Dunn bridge. As it cleared the Dunn bridge, the Lowery tow reduced its speed from 2½ miles per hour to 1½ miles per hour. The Lowery tow was bound to the Cargill grain elevators on the west side of the channel, a short distance below, at the Port of Albany; the Bouchard push tow was bound to the Gulf Oil Dock on the easterly side, or Rensselaer side, of the channel in the same near vicinity.

4. After the first sighting, the Bouchard maintained a speed from 5 to 7 miles per hour, and kept closing on the Lowery flotilla at this speed. As it came through the Dunn bridge, it blew a two-whistle signal which was not heard or acknowledged, or assented to by the Lowery. The Lowery tow had the standard lights, and its tow was in good line behind its tug. The Bouchard continued, and the deckhand was not sent to the bow of the barge until the Bouchard tow was about 100 feet from the last barge of the Lowery tow. An emergency was present, and on the signal from

the deckhand the engines of the Bouchard were put full speed ahead and the wheel hard right rudder. The port bow of the Bouchard struck the starboard stern of the last barge, the Marion O'Neil, with considerable force. The Bouchard at no time gave a danger signal. The place of contact was at a point 800 to 1100 feet below the Dunn Memorial Bridge. The time of the collision was 2:20 A. M. Eastern Daylight Time. The barge Marion O'Neil sank almost immediately, and because the impact was a strong, overriding one, it did not move far from the point of collision. The bow of the Marion O'Neil struck the stern of the Mae Lowery with such force that the entire tow surged alongside the tug Frank A. Lowery. The wreck of the Marion O'Neil, was at a point 1100 feet south of the south edge of the Dunn Memorial Bridge, 300 feet from the Rensselaer shore line, and 400 feet from the Albany shore line. The sunken Marion O'Neil was about 150 feet westward from the east channel line, and about 50 feet east of the mid-channel line. The Barge Mae Lowery sank ten to fifteen minutes later after reasonable efforts to save her, at a place approximately 2500 to 2600 feet beyond the south end of the Dunn bridge, and it lay athwart the west channel line. At the point of collision the channel was approximately 400 feet in width and 17 feet in depth. At the time of the collision it was a clear, moonlit night with good visibility, and there was no wind or current to affect navigation. There was no other traffic, northbound or southbound on the river at the time of the collision.

5. The situation prior to the collision was an overtaking one. The two-whistle signal was given to overtake and pass. There was no danger signal. The speed of the Bouchard tow gave it control of the overtaking situation. There was

nothing done by the Lowery to create the emergency. The Lowery tug was in good line behind its tow, was at or near mid-channel, and its tow did not abruptly sheer to block the entire navigable channel. The Bouchard should have reduced its speed to a minimum, or even reversed its speed, to insure safety and prevent collision. The mate of the Bouchard knew the Lowery tow was slow and had tendency to yaw. There was no fault or carelessness on the part of the Lowery or its personnel under the circumstances present.

6. The collision was the direct and proximate cause for the sinking of the barges Marion O'Neil and Mae Lowery. The impact was a severe one which crushed the stern of the Marion O'Neil. The barge did not sink from any inherent weakness or infirmity but solely by reason of the effects of the severe collision. The barges were sufficiently staunch, seaworthy and maneuverable for the purposes of their voyage, and would have discharged their cargo at the Cargill grain elevators except for the collision. The Lowery flotilla had made this voyage on many occasions over a long period of years.

CONCLUSIONS OF LAW

1. The Bouchard had the burden and obligation under the circumstances to slow down, keep astern and at such distance as to avoid the collision. The situation was a normal overtaking one and the Bouchard was in control of such overtaking and its consequences.

2. The collision was caused solely by a combination of error, mistake, confusion, faulty navigation and maneuver, together with lack of reasonable care, alertness, foresight

and judgment on the part of the mate and deckhand of the Bouchard that solely, proximately and directly caused the collision, the sinkings and the damage.

3. The tug Ellen S. Bouchard and those in charge of her were solely at fault and responsible for the collision, sinkings and damage. There was no fault on the part of the tug Lowery, and those in charge of such tug, and its tow, that caused or contributed to the collision. The force of the collision solely, proximately and directly caused the sinkings and damage. The Lowery tug and barges were sufficiently staunch, fit and seaworthy for the voyage they undertook.

4. The Libellant is entitled to an interlocutory decree in its favor with appropriate interest and costs.

JAMES T. FOLEY
*United States District Judge*

Dated: Albany, New York,
January 31, 1955.

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## Report of Commissioner

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

Civil No. 5017

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CARGILL, INC.,

*Libellant,*

—against—

TUG FRANK A. LOWERY and FRANK A. LOWERY, TUG ELLEN S. BOUCHARD, MOTOR TUG ELLEN S. BOUCHARD, INC. and BOUCHARD TRANSPORTATION CO., INC.,

*Claimant-Respondents,*

—and—

INLAND SURVEY BUREAU, INC.,

*Respondent-Impleaded.*

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The above entitled action was tried before the Hon. James T. Foley, United States District Court Judge for the Northern District of New York. Judge Foley rendered his opinion directing that a decree be entered in favor of libellant to recover the damages, with interests and costs, sustained to its cargo of grain involved in said action, against the tug ELLEN S. BOUCHARD in rem, motor tug ELLEN S. BOUCHARD, INC. in personam and BOUCHARD TRANSPORTATION CO., INC., in personam directing that the libel be dismissed as to the tug FRANK A. LOWERY, in rem and as to FRANK A. LOWERY, in personam, and further directing that the impleading petition against INLAND SURVEY BUREAU, INC., be dismissed.

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Accordingly, an interlocutory decree was entered on the 23rd day of February, 1955. The claimant-respondent appealed to the United States Court of Appeals for the Second Circuit and, in due course, this court affirmed Judge Foley's opinion. Thereupon, the lower court, on motion of libellant, ordered that the Judgment of the Court of Appeals for the Second Circuit be made its judgment and that the interlocutory decree entered on the 23rd day of February, 1955 be affirmed in all respects and, additionally, ordered that the matter be referred to this writer, as commissioner, to ascertain and compute the amount of libellant's damages and to report to the court. Pursuant to this order, I took and filed my oath as commissioner with the Clerk of the United States District Court for the Northern District of New York. Thereafter, I took the testimony of the witnesses produced by the respective litigants, received their exhibits, studied their briefs and the applicable law and respectfully report as follows:

The Lowery flotilla, composed of the motor vessel FRANK A. LOWERY and the barges WARREN W. CLUTE, INEZ LOWERY, BETTY L, GABE HEFFERN, MAE LOWERY and MARION O'NEILL, was proceeding in a southerly direction on the Hudson River at a point parallel to the southern end of the City of Albany at approximately 2:20 A.M. on September 25, 1953 when the

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collision giving rise to this libel occurred. The Lowery fleet was carrying grain, the property of libellant, and its destination was the Cargill grain elevators at the Port of Albany. The motor tug FRANK A. LOWERY was pulling its wooden barges tandem-style, the sixth and last barge being the MARION O'NEILL and the fifth barge being the MAE LOWERY. When the flotilla reached a point ap-

proximately 1000 feet south of the Dunn Memorial Bridge, which spans the Hudson River between South Albany and the City of Rensselaer, the barge MARION O'NEILL was struck in the stern by a steel barge which was being pushed by respondent's tug, the ELLEN S. BOUCHARD. The barge MARION O'NEILL sank almost immediately taking her cargo of 18,500 bushels of No. 3 Red Winter Wheat to the bottom with her. Shortly thereafter, the MAE LOWERY sank and joined her sister barge on the bottom with 19,000 bushels of No. 1 Red Winter Wheat in her holds. The remaining barges reached their destination.

Cargill, Inc. seeks to recover as damages the value of the 37,500 bushels of wheat contained in the holds of the sunken barges, the value of damaged wheat on the barge INEZ LOWERY and the costs of hiring Inland Survey Bureau, Inc. to advise it concerning the feasibility of undertaking salvage operations. Claimant-respondent meets these

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claims by offering proof that libellant did not exercise reasonable care and prudence in an effort to minimize its damages and, additionally, argues that Cargill, Inc. failed in its proof since their efforts were nominal and resulted in increased rather than decreased damages.

## POINT I

### Damaged Grain Aboard Barges MARION O'NEILL and MAE LOWERY

The issue of damages was uncomplicated to a large degree by a stipulation by and between the parties hereto fixing the value of the sunken grain at $2.00 per bushel immediately prior to the collision (95)* (libellant's exhibit

* Note: Numbers in parenthesis refer to the pages of the testimony taken before the Commissioner.

No. 1). Since the parties agreed as to the quantity and value of the grain the only issue remaining to be resolved is whether libellant discharged its duty to minimize damages.

That one whose property is damaged by another has a duty to minimize his damages is a legal principle as old as the law of damages itself. Justice and policy forbid anyone from collecting damages in excess of those which the injured party using all the skills and knowledge available to him might have avoided by the exercise of reasonable care. (The Baltimore v. Rowland, 75 U. S. 377; 19 L. ed. 463.) To deviate from such a rule would be tan-

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tamount to allowing the injured party to compound the negligence of the defendant to his own advantage. Not only would this be inconsistent with reason but it would violate all those principles of justice designed to equate a wrong with a just but minimum amount of compensation. One who commits a negligent act should be held responsible for the consequences normally resulting therefrom, but in no event should he become the victim of a chain reaction of events resulting in increased damages, if the injured party in the exercise of prudence could have prevented the same.

In my view, it would serve no useful purpose to discuss the duty of minimizing damages for it has been long and well established in the law of admiralty from the days of the sailing vessel to the present. It is my sole concern to determine from the evidence if libellant did everything that a reasonable and prudent grain owner, possessing identical skills and knowledge, would have done in like circumstances. In my opinion the libellant did not discharge its duty of minimizing damages and, in that respect, failed in its proof.

The fact that Judge Foley found that claimant-respondent BOUCHARD was solely responsible for the collision and stated that libellant was entitled to a "decree in full"

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(Judge Foley's opinion, page 16) over against BOUCHARD, and, subsequently, ordered that libellant recover its damages (Order and Notice of Entry, Civil No. 5017) from BOUCHARD, does not mean, as counsel for libellant argues, (4, 5, 7, 9, 10, 12, 13, 14) the loss was total. Rather, I take Judge Foley's language to mean that libellant is entitled to recover in full its provable damages. (O'Brien Bros. v. The Helen B. Moran, 160 F. 2nd 502.) The case was tried before Judge Foley on its merits as they related to liability. Proof as to damages was deferred. I reject Mr. Atkin's theory (21) which he advanced in the following language: "But any submission Mr. Commissioner . . . it is the finding of the Court that the grain on the barges MAE LOWERY and MARION O'NEILL were a total loss and that is binding upon the Commissioner." To accept such a theory, I would have to consider the purpose of this reference to be whether the determination of Judge Foley with respect to damages is correct. Rather, I regard the reference as an order to ascertain and compute libellant's damages from the testimony of the witnesses and the exhibits received in evidence.

The first and only witness called by libellant was Melville J. Horn, the President of Inland Survey Bureau, Inc. Mr. Horn testified that he was retained by Appleton

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and Cox, Inc., insurance underwriters, who had settled the loss with Cargill, Inc. under a loan receipt (25). Mr. Horn's firm was retained on the morning of September 25, 1953, the day of the collision, and a Mr. Hyland was sent to Albany to investigate and to report back to Mr.

Horn. The witness himself never came to Albany. Upon arriving in Albany, Mr. Hyland consulted with a Mr. Hockberg of Millhurst Mills, Freehold, New Jersey and with a Mr. Ormsby of Soybeans Products Co. in Oswego, New York, both of whom had been requested to proceed to Albany by Mr. Horn for the purpose of making an offer for the grain (26). On September 26, 1953 Mr. Hockberg made an offer of Two Thousand ($2,000.00) Dollars for the cargo in its "as is" condition plus one-half of any profit (32). Later that same day Mr. Ormsby made a flat offer of Two Thousand ($2,000.00) Dollars for the cargo "as is" (32). During the morning of September 28, 1953, Mr. Hockberg withdrew his bid and Mr. Ormsby's bid was rejected (35). Mr. Horn testified that the reason for rejecting the bid and ultimately abandoning the cargo was because Captain Westerfeld of the U. S. Engineers had informed him on the morning of September 28, 1953 that something would have to be done immediately to clear the navigable channel (34). Additionally, a Mr. Connie Ezmark had informed him that he would not undertake



salvage operations because he was only interested in the hulls (56). Mr. Horn didn't ask the opinion of any salvors as to the cost of salvaging the cargo (89) but estimated that it would cost not less than $12,000.00 (61). This estimate was based on his own experience in other salvage operations where the U. S. Army Engineers refused to permit salvaging of cargo unless the hulls were raised and disposed of (42). It was not a conclusion arrived at after weighing all the factors present at the site and time of this collision. Libellant's exhibit No. 10 in the trial before Judge Foley showed that the MARION O'NEILL was sunk in about 17 feet of water and that at low tide the top of the barge was between 5.6 feet and 7.5 feet below the surface of the water. The MAE LOWERY was 1.6

feet above the level of the water at low tide. These sunken barges contained in their holds 37,500 bushels of grain valued at $75,000.00 just prior to the collision. The owner of this grain is, admittedly, one of the largest grain operators in the world and though it doesn't deal in damaged products as a matter of policy it must be presumed that it had knowledge that reconditioned grain had a market value. Certainly, if libellant's cargo had been uninsured it would have taken every reasonable effort to minimize its loss by salvaging the grain, reconditioning it and selling it



for animal feed. It can only be excused from that duty under the present circumstances if the cost of salvaging and reconditioning the grain would exceed the value of the salvaged grain. (C. J. S. Vol. 25 #33; Pratt v. The Havilah, 50 Fed. 331; O'Brien Bros. v. The Helen B. Moran, 160 F. 2nd 502, 504.) Libellant offered no proof of what an actual salvage operation would cost nor any evidence of the market value of reconditioned grain. In fact, libellant did not even attempt to contradict the evidence of the claimant-respondent that the grain could be reconditioned and sold at a price that would have prevented an increase in damages.

A careful study of Mr. Horn's testimony as well as the testimony of libellant's other witnesses at the trial before Judge Foley, has failed to convince me that a reasonable, prudent attempt was made to minimize damages. The libellant leans heavily on the fact that the barges were sunk in a navigable channel thereby causing the U. S. Army Engineers to exert some pressure for their prompt removal. Admittedly, this is a fact that must be considered in determining if libellant's decision to abandon its cargo was justified. However, when Mr. Horn's lengthy experience in salvage operation (24) together with the specialized

knowledge that must be imputed to libellant are considered, it seems reasonable to me that more positive steps should

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have been taken to ascertain if salvage operations would have been commercially expedient. Neither libellant nor Mr. Horn inquired of any salvors what the actual cost of raising the cargo and hulls would be. No inquiry was made with respect to marketing damaged grain. The shortness of time cannot excuse these lapses. The U. S. Army Engineers did not begin salvage operations until September 29, 1953, four days after the sinkings. Certainly, a man of Mr. Horn's experience could have ascertained during that time what it would have cost to raise the cargo and moor the hulls on the shoreline. Additionally, he could have determined what price per ton damaged grain was selling for in the animal feed market. It might be argued that he would not have been able to conclude whether the number of tons of grain recoverable would bring a monetary return large enough to justify the expenditures for salvaging. This argument is without merit in face of the consistent position of the courts that frequently salvage operations are necessary in order to ascertain the extent of the damage. If after raising the damaged vessel and/or cargo it is determined that its value is less than reasonable costs of repairs or of reconditioning, there would be a constructive total loss and the expenses for raising the vessel and/or cargo would be allowed. This principle was clearly

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stated in the case of Pettie v. Boston Tow-Board Co. (1891), 49 Fed. 464, and it is still applicable today. The court said (467):

> "It is undoubtedly the duty of the owner of a vessel, which has been sunk by the negligent act of another,

to endeavor to raise and repair her and save her cargo, if under the circumstances of the case, there is a reasonable probability that he can thereby mitigate the loss. If under such circumstances, he does not do so, he will not be permitted to profit by his own remisses. No principle in the law of damages is better established than that indemnity does not include damages which arise in consequence of the inactivity of the complaining party. This principle has often been applied in admiralty, and to encourage reasonable endeavor on the part of those who have sustained loss, to mitigate the consequences, the courts have allowed to the owner of a vessel sunk in a collision the costs of raising her, besides her value before the wreck, when it was necessary to raise her to ascertain whether she was worth repairing. (Pettie v. Boston Tow-Boat Co., 49 Fed. 464.)

It is to be noted that the courts, in order to encourage injured parties to reasonable endeavors to minimize damages, allow the costs of salvaging if it then appears there is a constructive total loss. Conversely, if the complaining party does not take reasonable and prudent steps to mitigate his loss recovery for those damages resulting from his inactivity will be denied. (Baltimore v. Rowland, 75 U. S. 377; Pratt v. The Havilah, 50 Fed. 331.)

The libellant did not argue that its cargo, as a result of



the sinkings, was a total loss for the purpose for which it was intended, i.e., human consumption. All parties agreed that once grain has been submerged in water for a period in excess of twenty-four hours it cannot thereafter be dried sufficiently for human consumption. In the case at bar,

it would have been impossible to raise the grain from the holds of the sunken barges within that period. That raises the question whether libellant would have been justified in abandoning the cargo because it had become a total loss for human consumption. This question, in my opinion, must be answered in the negative. The libellant offered no proof with respect to the perils against which the cargo was insured nor was any proof offered showing that the perils insured against destroyed or so injured the cargo as to cause it to be of trifling or no value to libellant for the purpose and use for which it was intended. The fact that the insurance underwriter may have paid the full amount of libellant's claim is not, by itself, sufficient proof of a total loss. In the case of Weirton Steel Co. v. Lebrandtsen-Moller Co., Inc. (2nd Cir. 1842), 126 F. 2nd, 593, the Court said:

> "The fact that the underwriter agreed to pay the full amount claimed . . . is not material; for all we know, he may have thought it worthwhile to keep the goodwill of an important customer."

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Additionally, the evidence offered by libellant clearly indicates that they didn't regard the cargo as a total loss even after it had been submerged for a time sufficient in length to make it unfit for human consumption. The cargo sank at approximately 2:00 A.M. September 25, 1953 and libellant didn't formally abandon it until the morning of September 28, 1953 (4,214).

The only probative evidence offered with respect to the cost of salvaging the damaged cargo was offered by the respondent BOUCHARD. Captain Theodore De Mars testified that it would cost $5,731.00 to salvage the cargo and deliver it to the Cargill plant at Albany (171), and $7,837.00

for a similar operation with delivery at New York City (111). Since the drying equipment at Albany was inadequate (102) I will only consider the cost of salvaging and delivering in New York. Captain De Mars testified in detail as to the equipment needed and the costs per day per unit of equipment (132) to raise the wrecks, place the damaged grain in lighter barges, anchor the hulls on the shore, and deliver the damaged grain in New York City. De Mars testified that such an operation could have begun on Saturday morning, September 26, 1953 (111). This testimony is uncontradicted. Presumably, if salvage operations could

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have been started on September 26, 1953, the U. S. Army Engineers would have been satisfied.

Claimant-respondent BOUCHARD called a Mr. Bert Eisenberg and a Mr. Jack Hanisch both of whom are engaged in the business of manufacturing and selling animal feeds. Mr. Eisenberg testified that his company, Animeam Ingredients, Inc., (143) was one of five or six such companies in the Brooklyn area alone that purchased damaged food products, including grain, for resale as animal feed (142). He testified that at the time of the happening of this accident grain of the quality carried on the sunken barges had in his opinion, a retail value of between $55.00 and $60.00 per ton after it had been dried (144). He testified that the drying costs would be between $4.00 and $5.00 per ton. This testimony is uncontradicted.

Mr. Hanisch has been a buyer and seller of damaged grain since 1934 (154). He testified that in his opinion grain of the quality owned by libellant had a retail value, after it had been reconditioned, of between $55.00 and $58.00 per ton (156). This testimony is uncontradicted.

Both Mr. Eisenberg and Mr. Hanisch testified that No. 1 and No. 3 Red Winter Wheat could be totally saturated

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with water and, after reconditioning, have a value equal to or greater than dried brewers grain. Brewer's dried grain had an actual market value of $57.00 per ton during the entire month of October, 1953 (Bouchard Exhibit No. 5 and 5a). This testimony was uncontradicted and the admission of claimant-respondent's exhibit was without objection (178).

The conduct of Inland Survey Bureau, Inc., the subrogee, must be regarded as the conduct of Cargill, Inc. This conduct, in my opinion, was not sufficient under the circumstances to discharge the duty of minimizing damages. Libellant knew that a cargo valued at $75,000.00 was submerged in comparatively shallow water. Yet, beyond assigning its rights under a loan receipt agreement with its insurance underwriters, it did nothing to determine if the cargo could be salvaged and resold. The underwriters retained Inland Survey Bureau, Inc. to study the facts and report if salvaging would be feasible. Mr. Horn, the president of Inland Survey Bureau, Inc. and the gentleman who ultimately made the decision to abandon the cargo, didn't even come to Albany to view and study the situation first hand. He sent a Mr. Hyland whose activities with respect to determining the feasibility of salvaging were, in my

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opinion, nominal. He was not called as a witness for libellant.

For these reasons, I find that the libellant did not discharge the duty to minimize its damages and its loss is partial, rather than total, with respect to the number of bushels that could have been salvaged if libellant had undertaken such an operation. Additionally, I find that libellant's loss is total with respect to the number of bushels that could

not have been salvaged if such an operation had been initiated. Considering the nature of the product involved and the fact that this product was being transported in wooden barges which received a severe blow from the rear by a steel barge causing some of the tarpaulins to be torn away from the holds of both sunken barges and breaking a number of timbers on both vessels (195) I do not think it unreasonable to assume that a quantity of the grain would have floated out of the holds and dispersed itself on the river bed. Captain De Mars testified that, in his opinion, 35,000 bushels could be salvaged. While I recognize the eminent qualifications of Captain De Mars, I am more persuaded by the actual experience of Franklin H. Haber, Chief of Operations of the Army Engineers who supervised the Engineer's salvage operation. He testified that 29,555

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bushels were raised from the holds of the sunken vessels (210). From this testimony I have concluded that had libellant prudently commenced salvage operations it would have been unable to raise 7,945 bushels and as to that amount should be compensated in full. As to the 29,555 bushels that could have been raised, reconditioned and sold libellant's loss is partial and he can only recover the difference between the full value of the grain and what it could have been sold for in the animal feed market in October of 1953.

Libellant offered no proof as to the value of animal feed in September or October of 1953, nor was any proof offered as to costs for reconditioning the grain for resale. Cargill, Inc. also failed to introduce any satisfactory evidence as to the costs of salvaging. Mr. Horn merely stated that, in his opinion, based on prior experiences, it would not be commercially feasible to undertake such a task. (The fact that

he may have been led to this conclusion by Mr. Connie Ezmark's refusal to undertake the job is of little moment.) Mr. Ezmark was only interested in the hulls (35) and gave no detailed breakdown of the costs entailed in order to salvage the grain.

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Accordingly, I find that 29,555 bushels of grain could have been salvaged and delivered in New York City for reconditioning and resale as animal feed at a cost of $7,837.00. This number of bushels could have been reconditioned at a cost of $4.00 per ton or $3,546.96 (145).* After reconditioning, the 886.74 tons could have been sold as animal feed for $50,544.18.

Therefore, I compute libellant's damages to be $35,839.42. This sum is arrived at as follows:

| | |
|---|---|
| a) 7,945 bushels @ $2.00 per bushel ..... | $15,890.00 |
| b) 29,555 bushels (886.74 tons) @ $57.00 per ton equals $50,544.18; 29,555 bushels @ $2.00 per bushel equals $59,110.00; $59,110.00 minus $50,544.18 equals ..... | 8,565.82 |
| c) Cost of raising and delivering grain in New York City ..... | 7,837.00 |
| d) Cost of reconditioning grain for resale .... | 3,546.60 |
| Total ..... | $35,839.42 |

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* Note: 33-1/3 bushels of grain = one ton
29,555 bushels of grain = 886.74 tons

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## POINT II

### Damaged Grain Aboard Barge INEZ LOWERY

Cargill, Inc. seeks to recover the sum of $1,385.43 which amount it argues represents damages to the grain carried on the barge INEZ LOWERY. This barge did not sink. It reached its destination, the Cargill plant in the Port of Albany. Counsel for Cargill, Inc. stated at the first hearing that he was not prepared to introduce testimony with respect to the grain carried on the surviving barges. Thereafter, he failed to offer any proof as to damages to cargo carried on any of the vessels other than the MAE LOWERY and the MARION O'NEILL. The only evidence touching on damages to grain carried on the INEZ LOWERY was elicited by counsel for claimant-respondent in cross examining Mr. Horn. He testified that when the grain aboard the INEZ LOWERY was dried it produced 769.33 bushels (84). This dried grain was then sold for twenty cents a bushel without competitive bids. Following the reasoning set forth above with respect to the damaged grain carried in the sunken vessels it necessarily follows that libellant had two courses of action that would have mitigated its loss. If the 769.33 bushels (23 tons) had been sold as animal feed it would have yielded the sum of $1,311.00. This approximates the amount it now seeks to recover without

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any proof that an attempt to minimize was made. Secondly, if the grain was not saturated to the degree of 30% it could have been dried and sold for human consumption. Since it was sold as dried grain (84) it must have been dried at Cargill's plant in Albany. Mr. Marshall, the operating superintendent of libellant's plant in Albany, testified that their drying mechanism could not dry grain saturated be-

yond 15% (159). Since the No. 3 Red Winter Wheat had a 13% moisture content when it was loaded on the barges in Buffalo and the No. 1 Red Winter Wheat had a 12.6% moisture content when loaded, the amount of absorption of water as a result of the collision was negligible. Consequently, since libellant has stipulated that the value of the grain prior to the mishap was $2.00 a bushel I find little, if any, diminution in value as a result of the accident. Therefore, I find that the grain aboard the INEZ LOWERY had a value of $1,538.66 which is in excess of the amount sought. As to the grain carried aboard the INEZ LOWERY I find that libellant did not sustain any damage.

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## POINT III

### Costs of Retaining Inland Survey Bureau, Inc.

The libellant also claims it was damaged in the amount of $527.67 which is the fee charged by Inland Survey Bureau, Inc. for the services rendered to Appleton and Cox, Inc., the insurance underwriters. It is unquestionably the law that an injured party is entitled to recover the reasonable costs of salvaging where it is necessary to undertake such a task to ascertain whether damages can be minimized. (Pettie v. Boston Tow-Boat Co. 49 Fed. 464). Where, however, the actions taken are so nominal that they are not productive of results upon which reasonable and logical conclusions can be based, such actions are not compensable.

I have heretofore set forth in full my reasons for believing that libellant did not prove that it had done everything a reasonable and prudent owner, with like skills and facilities, would have done under similar circumstances. Since I have found that libellant failed in its proof in that respect, it reasonably follows that Cargill, Inc. is not entitled

to recover as damages the sum paid to Inland Survey Bureau, Inc.

I have considered all the evidence and the exhibits and

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I have found that libellant, Cargill, Inc., is entitled to recover from the Bouchard interests the amount of $35,839.42, with interest from September 25, 1953, the costs to be taxed by the court.

Respectfully submitted,

A. FRANKLIN MAHONEY
*Commissioner*

Troy, N. Y.: February 25, 1957

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STATEMENT

I herewith submit that the fair and reasonable value of my services is three thousand ($3,000.00) dollars. This sum has not been paid to date.

A. FRANKLIN MAHONEY
*Commissioner*

Dated: February 25, 1957
Troy, New York

**Memorandum Decision**

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Civil No. 5017

---

CARGILL, INC.,

*Libellant,*

—against—

TUG FRANK A. LOWERY and FRANK A. LOWERY, TUG ELLEN S. BOUCHARD, MOTOR TUG ELLEN BOUCHARD, INC., and BOUCHARD TRANSPORTATION CO., INC.,

*Claimant-Respondents,*

—and—

INLAND SURVEY BUREAU, INC.,

*Respondent-Impleaded.*

---

APPEARANCES:

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HORACE T. ATKINS, ESQ.,
*Of Counsel.*

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*Proctors for Claimant-Respondents,*
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MAX TAYLOR, ESQ.,
*Of Counsel.*

*Memorandum Decision*

HON. JAMES T. FOLEY, *D.J.*

The Report of the Commissioner as it covers his determination upon reference of the money damages to be paid Libellant Cargill, Inc., by Claimant-Respondents Bouchard, has written exceptions filed to it by both sides. In my judgment, the exceptions of Cargill, which relate mainly to the reasoning by the Commissioner as to the failure of Cargill to minimize damages, are well taken and must be sustained. Such reasoning led to a most drastic reduction of the Cargill claim.

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The exceptions of Bouchard only aimed at collateral matters with no attack upon the amount of money damages fixed by the Commissioner had little merit, in my judgment, and in view of the disposition I make need no discussion and must be denied.

It has been a long voyage. The issue of the liability for the collision occurring on September 25, 1953, between the parties here, together with other interests involved, was decided adversely by me to the Bouchard interests. This opinion is reported in 128 F. Supp. 16, and such decision was affirmed by the Court of Appeals, Second Circuit, on the opinion below. (229 F. 2d 436).

The Report of the Commissioner is not sacrosanct by any means. By its terms Rule 43½ of the Rules of Practice in Admiralty and Maritime cases (28, Rules, U. S. C. A., Rule 43½) provides:

"* * * but the report of the Commissioner * * * shall be treated as presumptively correct, but shall be subject to review by the court, and the court may adopt the same, or may modify or reject the same in whole or in part when the court, in the exercise of its judgment, is fully satisfied that error has been committed. * * *"

Even the application of the "clearly erroneous" doctrine allows the correction of apparent mistake. (U. S. v. U. S. Gypsum Co., 333 U. S. 364, at page 395; Gindorff v. Prince, 2 Cir. 189 F. 2d 897).

It is always with reluctance that I disturb the fact-finder, and more so here because of the skill and competence of the Commissioner in the conduct of and the rulings at the hearings as evidenced by the record made before him. However, the record of the trial before me was stipulated as part of the record before the Commissioner, and my recollection of it and my review of the evidence before the Com-

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missioner, make the conclusion inescapable that the established rule as to the duty to minimize was too harshly and narrowly interpreted without due regard to the actualities and realities of the situation present at and shortly after the collision. It is also my feeling that if the Proctors for the libellant had argued and briefed the law and facts for the Commissioner as they did for me and suppressed any cock-sure attitude, it is possible their present dilemma might have been avoided. Along this line I am frank to say I did not decide at the trial, or intend to so decide, any issue as to the amount of actual loss sustained by any party. The chief aim was to decide liability and responsibility, and the slight evidence as to damages was taken only to the extent material and helpful on this main issue. The duty to minimize never entered my mind.

However, this established principle of law concerning the duty to minimize, well-discussed by the Commissioner, must be considered and applied in view of the circumstances present. It is a rule of reason and prudence based on reasonable probability and honest, human judgment. It does not require infallibility or exactness of mathematical for-

mula, and I cannot read such absolute in the cases cited by the Commissioner to support his inferences and conclusion. (The Baltimore v. Rowland, 75 U. S. 377; Pettie v. Boston Tow-Boat Co., 49 Fed. 464, 466; Pratt v. Havilah, 50 Fed. 331; O'Brien Bros. v. The Helen B. Moran, 160 F. 2d, 502, 504).

Whether the hiring of a competent cargo surveyor firm, as one would ask the judgment of a lawyer, doctor or engineer, would discharge the duty to minimize is not necessary to this decision because from my analysis the decision

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of Inland Survey Bureau, Inc. not to undertake salvage operations seems clearly justified. In a case with much similarity, it was decided that a 10% reduction for lack of diligence in conducting salvage operations was "a mere speculative reduction for which there exists no basis in fact." (Grace & Co. v. Charleston Lighterage & Transfer Co., 4 Cir. 193 F. 2d, 539, 544).

Mr. Horn, President of the Inland Survey Bureau, was the straw man set up by the agile-minded proctors for Bouchard both at the main trial and at the hearings before the Commissioner. I found no taint of any fraud or incompetence on his part or his firm when I rendered my opinion, nor do I see any now. This firm has been in the marine survey business since 1927 or 1928 (page 24)* and the most eloquent and honest testimonial to the qualifications of Horn was made by Captain DeMars, the survey expert, called by Bouchard. (page 136). The gist of such testimony is that Horn was one of the best to appraise the cargo problem of sunken wheat as it existed at the time and place.

There are many factors actually present that militate against the conclusion of the Commissioner and support the

* Page references shall only be to record before Commissioner.

judgment, at least to show reasonableness, of Horn. Many are listed in my opinion and many are in the record before the Commissioner. The collision happened on a week-end. It was one of extreme force, as shown by the fact the barge captain at the end of the tow had no chance to get out. The testimony of the Army diver showed that this barge was practically split wide open. An emergency existed in the channel because the tug Kehoe ran afoul of the other sunken barge several hours after the collision. The barge owner formally and legally abandoned the barges several hours

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after the sinking. The Army Engineers were atop the situation the following morning and knew more about it than anyone else. I see no fault in Horn being down in New York City, a center of responsibility for decision by the Army Engineers with modern communications present to receive and evalute reports from the people on the scene. Brennan, the Army Engineer in charge on the scene, was impressive at the main trial.

The cargo sunk was wheat, a perishable commodity, admittedly saturated and expanded to a point which changed its character, and as Horn put it before the Commissioner, just as wet one foot under the water as one hundred feet. (page 64). (See The Baltimore, pages 386, 387).

Another fact of great importance that had to be weighed by Horn in the interests of his client was the Summary Removal Statute (33 U. S. C. A. 415). This statute (the Proctors for libellant admit it was not brought to the attention of the Commissioner) gave the Army Engineers the right to take over at any time in order to clear the channel. I think it important to consider because if Horn undertook salvage he had it all, cargo and barges, with the addition of someone looking over his shoulder armed with statutory authority to interfere if not satisfied.

A most decisive factor in the record that favors and warrants the decision not to spend money on private salvage is the admitted immensity of the task. Horn's estimate was two lighter barges, derrick, diver, pumps, clam shell, etc. (page 57). Then Captain DeMars with the statement that the equipment to salvage would have to come from New York, and he listed steam crane, barges, tug, etc. etc. (pages 112-13). Match this against what the Army finally did and the decision of Horn, whether he be acting for Cargill or the underwriters, is surely reasonable, if

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not obvious. Many imponderable elements are natural in such situations.

Most vital of all to justify the estimate of Horn that it would cost $12,000.00 is the fact it actually cost the Army Engineers $17,751.43 for the entire operation. The wheat sold by the Army only obtained $2,945.00. It is interesting to note that the private bids requested by Inland were only slightly below the amount which was received by the Army Engineers after competitive bidding pursuant to the Statute. This net actual expenditure of $14,806.43 cannot be laughed off as government bookkeeping or the result of a "give-away" based merely upon innuendo without basis in fact. To corroborate further the intelligence and competency of Inland, the hulls were salvaged by Connie Ezmerk's firm, the man Inland originally contacted on the whole problem. Again, this contract was awarded after competitive bidding.

There is nothing between the testimony of DeMars, a hull surveyor, and the two alleged experts from New York, one a dairy farmer, in the effort to establish the value of animal feed in the New York market. Even if such evidence were reliable and in closer harmony with reality,

it is questionable whether the New York City value would legally be the proper market for the ascertainment of value in this case. The proper measure of damages is the damage sustained by the party *at the time and place of injury.* (Smith v. Condry, 42 U. S. 28; The City of New York, 23 Fed. 616.) Despite this question the holding that the libellant should transport the wheat to the New York market again accentuates the extreme burden sought to be placed by a tort feasor on an innocent party.

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There is not one fact I can find to support the exaggerated and speculative inference urged by Bouchard that someone obtained a tremendous bonanza from the purchase of this wet and damaged wheat. The combined experience and competence of Inland Survey and the Army Engineers in the ordinary course of their business are the best answer to such unproven speculation.

All this adds up to the common sense of the situation. As recently stated by the United States Supreme Court in Peak v. U. S., decided March 25, 1957: "That seems to us to be the common sense of the matter, and common sense often makes good law."

I shall confirm the disallowance of the sum of $1,385.43 for the damaged grain aboard the Inez Lowery, which did not sink. I do this upon the second ground set forth by the Commissioner at page 20, inasmuch as the evidence supports his conclusion that the amount of water absorbed by the grain was negligible.

The libellant may recover for a total loss of cargo on the barges Marion O'Neil and Mae Lowery money damages from the Bouchard interests in the amount of $75,000.00. Libellant may recover the expenditure of $527.67 for the services of Inland, for a total award of $75,527.67,

with interest and costs, in accordance with the interlocutory decree.

The exceptions of the libellant in accord with and material to this decision are Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth only as to amounts above, and Seventeenth. These exceptions to the Report are sustained and granted. The exceptions filed by Bouchard, Claimant-Respondent, are denied.

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The Report of the Commissioner is modified as indicated herein, and as so modified is confirmed. A final decree in accordance herewith shall be submitted if agreed upon, otherwise settled on three days' notice.

Dated: Albany, New York,
June 4, 1957.

**Order**

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

Civil No. 5017

---

CARGILL, INC.,

*Libellant,*

—against—

TUG FRANK A. LOWERY AND FRANK A. LOWERY, TUG ELLEN S. BOUCHARD, MOTOR TUG ELLEN S. BOUCHARD, INC. AND BOUCHARD TRANSPORTATION CO., INC.,

*Claimant-Respondents,*

—and—

INLAND SURVEY BUREAU, INC.,

*Respondent-Impleaded.*

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SIRS:

PLEASE TAKE NOTICE that the within is a copy of a proposed order, the original of which will be presented for signature before the Honorable James T. Foley, Judge of this Court, in the United States Court House at Utica, New York, on the 17th day of June, 1957, at 10:00 o'clock A.M. of said day, at the commencement of the Motion Term of said Court, or as soon thereafter as counsel may be heard.

*Order*

Dated: New York, N. Y.,
June 10, 1957.

Yours, etc.,

JAY S. CAPLAN
11 North Pearl Street
Albany, N. Y.

and

ATKINS & WEYMAR
70 Pine Street
New York, N. Y.

*Proctors for Libellant*

To:

JAMES F. DALTON, Esq.
11 North Pearl Street
Albany, N. Y.

—and—

KRISEL, BECK & TAYLOR, Esqs.
27 William Street
New York, N. Y.

*Proctors for Claimant-Respondents*

G. A. PORTER, *Clerk*
United States District Court,
Northern District of New York
Utica, New York

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The proposed order is identical with the Final Decree following herewith.

**Final Decree**

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

Civil No. 5017

CARGILL, INC.,

*Libellant,*

—against—

TUG FRANK A. LOWERY AND FRANK A. LOWERY, TUG ELLEN S. BOUCHARD, MOTOR TUG ELLEN S. BOUCHARD, INC., AND BOUCHARD TRANSPORTATION CO., INC.,

*Claimant-Respondents,*

—and—

INLAND SURVEY BUREAU, INC.,

*Respondent-Impleaded.*

Exceptions having been taken by Libellant, Cargill, Inc. and by Motor Tug ELLEN S. BOUCHARD, Inc., and Bouchard Transportation Co., Inc., Claimant-Respondents, to the Commissioner's Report, and said exceptions having been brought on for hearing before the Hon. James T. Foley on the 18th day of March, 1957, and after hearing Atkins & Weymar, Esqs., proctors for Libellant, by Horace T. Atkins, Esq., of counsel, in support of said exceptions of Libellant, and Krisel, Beck & Taylor, Esqs., by Max Taylor, Esq., of counsel, in opposition thereto, and after due deliberation having been had thereon, and the Court having rendered and filed its opinion in writing sustaining and granting Libellant's exceptions numbered second, third,

fourth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth, (but exclusive of the alleged damage of $1,365.43 allegedly resulting from damage to 768.33 bushels of grain on the barge INEZ LOWERY), and seventeenth, and denying all exceptions filed by Motor Tug ELLEN S. BOUCHARD, Inc., and Bouchard Transportation Co., Inc., Claimant-Respondents,

Now, on motion of Jay S. Caplan, Esq., and Atkins & Weymar, Esqs., proctors for Libellant, it is

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ORDERED, that the exceptions of Libellant numbered second, third, fourth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth, and fifteenth, (but exclusive of the alleged damage of $1,365.43, allegedly resulting from damage to 768.33 bushels of grain on the barge INEZ LOWERY), and seventeenth, are sustained and granted, and all exceptions of Motor Tug ELLEN S. BOUCHARD, Inc., and Bouchard Transportation Co., Inc., Claimant-Respondents, are hereby denied.

Dated, Albany, N. Y.,
June 17, 1957.

JAMES T. FOLEY
*U.S.D.J.*

## Notice of Appeal

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF NEW YORK

Civil No. 5017

CARGILL, INC.,

*Libelant,*

—against—

TUG FRANK A. LOWERY AND FRANK A. LOWERY, TUG ELLEN S. BOUCHARD, MOTOR TUG ELLEN S. BOUCHARD, INC. AND BOUCHARD TRANSPORTATION CO., INC.,

*Claimant-Respondents,*

—and—

INLAND SURVEY BUREAU, INC.,

*Respondent-Impleaded.*

SIRS:

PLEASE TAKE NOTICE that claimant-respondents, tug ELLEN S. BOUCHARD, Motor Tug Ellen S. Bouchard, Inc., and Bouchard Transportation Co., Inc., hereby appeal to the United States Court of Appeals for the Second Circuit from each and every part of the final decree entered herein on June 17, 1957, and from so much of the order entered herein on June 17, 1957, that sustains libelant's exceptions to the Commissioner's report, and denies the exceptions of claimant-respondents.

*Notice of Appeal*

Dated: New York, N. Y., June 26, 1957

Yours, etc.

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&

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*Proctors for Claimant-Respondents*

To:

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&

ATKINS & WEYMAR, ESQS.
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*Proctors for Libelant and Respondent-Impleaded*